

ARBITRATION HEARING - SEPTEMBER 20, 2010

1

AMERICAN ARBITRATION ASSOCIATION

DALLAS, TEXAS

TRICON ENERGY, LTD.,)
)
Claimant,)
) CASE NO.
- against -) 70 198Y 00168 09
)
VINMAR INTERNATIONAL, LTD.,)
)
Respondent.)

TRANSCRIPT OF PROCEEDINGS

BE IT KNOWN THAT the above-entitled matter came on for arbitration at 8:50 a.m. on the 20th day of September, 2010, at the Houston Club, 811 Rusk, 10th Floor, Travis Room, Houston, Texas, before the Honorable Levi Benton, Presiding, the Honorable Sharolyn Wood and the Honorable Mark Davidson, Arbitrators, and the following proceedings were had:



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<p>1 APPEARANCES:</p> <p>2</p> <p>3 THE PANEL OF ARBITRATORS:</p> <p>4 Honorable Levi Benton, Chair</p> <p>4 Honorable Sharolyn Wood</p> <p>4 Honorable Mark Davidson</p> <p>5</p> <p>6 FOR THE CLAIMANT, TRICON ENERGY, LTD.:</p> <p>7 Mr. George R. Diaz-Arrastia</p> <p>7 Ms. Tracy D. Larson</p> <p>8 SCHIRRMEISTER, DIAZ-ARRASTIA & BREM, LLP</p> <p>8 700 Milam, 10th Floor</p> <p>9 Houston, Texas 77002</p> <p>9 Tel: (713) 221-2500</p> <p>10 FAX: (713) 228-3510</p> <p>10 gdarrastia@sdablaw.com</p> <p>10 tlarson@sdablaw.com</p> <p>11</p> <p>12 FOR THE RESPONDENT, VINMAR INTERNATIONAL, LTD.:</p> <p>13 Mr. Stephen H. Lee</p> <p>13 Mr. R. Blake Runions</p> <p>14 PORTER & HEDGES, LLP</p> <p>14 1000 Main Street, 36th Floor</p> <p>15 Houston, Texas 77002-6336</p> <p>15 Tel: (713) 226-6000</p> <p>16 FAX: (713) 226-6286</p> <p>16 slee@porterhedges.com</p> <p>16 brunions@porterhedges.com</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 Mr. Mark S. Antonovich</p> <p>19 Ms. Dana Hodges</p> <p>20 Mr. Brad Lockwood</p> <p>20 Ms. Myra Mendez</p> <p>20 Ms. Petrice Podlesny</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>2</p> <p>1 JOINT EXHIBITS NUMBER AND DESCRIPTION PAGE</p> <p>3 Exhibit 1..... 12-11-07 Contract between Tricon Energy and KP Chemical Corp. TRI 286-290</p> <p>5</p> <p>6 Exhibit 2..... 7-22-08 Fax to Rick Wilson attaching first MOAB Confirmation VIN 21-23, Exhibit 2</p> <p>7</p> <p>8 Exhibit 3..... 7-22-08 Fax to Rick Wilson attaching second MOAB Confirmation VIN 19-20, Exhibit 3</p> <p>10</p> <p>11 Exhibit 4..... 7-23-08 Fax to Rick Wilson attaching third MOAB Confirmation VIN 17-18, Exhibit 4</p> <p>12</p> <p>13 Exhibit 5..... 7-23-08 Email string between Brad Lockwood and Rick Wilson, cc'ing others and attaching letter from Tricon Energy TRI 6-10, Exhibit 15</p> <p>16</p> <p>17 Exhibit 6..... 7-24-08 Email from Rick Wilson to Laurentiu Pascu, cc'ing Brad Lockwood, attaching letter from Tricon Energy VIN 85-89, Exhibit 29</p> <p>18</p> <p>19 Exhibit 7..... 7-22-08 Vinmar's SAP Data VIN 91-A-VIN 91-B, Exhibit 32-33</p> <p>21</p> <p>22 Exhibit 8..... 7-25-08 Email string between Eduard Anaya and Rick Wilson, cc'ing others VIN 90, Exhibit 31</p> <p>23</p> <p>24</p> <p>25</p>
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8-6-08 Email string between Vuk Rajevac, Rick Wilson and Laurentiu Pascu, cc'ing others				7-20-08 Contract between Tricon Energy and KP Chemical Corp., attaching average MX price for September			
VIN 81-82				TRI 36-40			
Exhibit 18..... --				Exhibit 5..... --			
8-6-08 Email from Ed Leyman to Brad Lockwood, forwarding email from Rick Wilson				7-22-08 - 8-6-08 Instant message communications between Brad Lockwood and Ed Leyman			
TRI 21, Exhibit 9				TRI 43-51, Exhibit 5, 8			
Exhibit 19..... --				Exhibit 6..... --			
8-6-08 Email from Ed Leyman to Brad Lockwood, forwarding email from Rick Wilson				7-22-08 - 7-23-08 Instant message communications between Brad Lockwood and Ed Leyman			
MOAB 62				TRI 30-33			
Exhibit 20..... --				Exhibit 7..... --			
8-8-08 Email from Ed Leyman to Brad Lockwood, forwarding email from Rick Wilson				7-23-08 Fax to Rick Wilson attaching letter from Tricon Energy			
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8-9-08 Email string between Brad Lockwood, Mark Antonovich and Vuk Rajevac, cc'ing others				7-23-08 Email string between Jason Luoh and Rick Wilson, cc'ing others			
VIN 40-42				VIN 138-139, Exhibit 40			
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8-11-08 Email from Brad Lockwood to individuals at KP Chemical Corp.				7-23-08 Email string between Jason Luoh and Rick Wilson, cc'ing others			
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8-12-08 Email string between Brad Lockwood and Mark Antonovich, cc'ing others				7-24-08 Vinmar International Purchase Order			
VIN 49-50				VIN 95-97, Exhibit 34			
				Exhibit 11..... --			
				7-24-08 Vinmar International SAP Data			
				VIN 91a-91b, Exhibit 32-33			
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				7-24-08 Vinmar International SAP Data			
				VIN 91, Exhibit 30			
JOINT EXHIBITS (Continued)			7	TRICON EXHIBITS (Continued)			9
NUMBER AND DESCRIPTION	PAGE			NUMBER AND DESCRIPTION	PAGE		
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9-22-08 Contract between Tricon Energy and J&J Chemtrading Co.				7-29-08 Email string between Vuk Rajevac and Laurentiu Pascu, attaching edits to letter from Tricon Energy			
TRI 98-100				VIN 27-31			
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10-2-08 E-mail string between Gigi Ren and W.S. Shim, cc'ing others				7-29-08 Email string between Rick Wilson and Laurentiu Pascu			
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10-6-08 Email from Brad Lockwood to Rick Wilson and Mark Antonovich, attaching invoice				8-4-08 Email string between Rick Wilson and Devang Mehta			
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10-20-08 Commercial Invoice from Tricon to Lotte Bussan for sale of MX				8-6-08 Email string between Brad Lockwood, Ed Leyman and Rick Wilson, cc'ing others			
TRI 316-318				MOAB 25-26			
Exhibit 28..... --				Exhibit 17..... --			
11-4-08 Job Transaction Summary Report of Tricon Energy purchase of MX				8-6-08 Email from Rick Wilson to Hermant Goradia, cc'ing others			
TRI 319-322				VIN 59, Exhibit 45			
TRICON EXHIBITS				Exhibit 18..... --			
NUMBER AND DESCRIPTION	PAGE			8-7-08 Email from Rick Wilson to Mark Antonovich, forwarding email string between Rick Wilson, Vuk Rajevac and Laurentiu Pascu			
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10-23-07 MOAB Confirmation				Exhibit 19..... --			
TRI 259				8-10-08 Email string between TS Kim and Rick Wilson, cc'ing others			
Exhibit 2..... --				VIN 156-158			
10-23-07 MOAB Confirmation				Exhibit 20..... --			
TRI 260				9-3-08 Email string among Sa Uk Chang, W.S. Shim and Gigi Ren, cc'ing others			
Exhibit 3..... --				TRI 2555-2558			
10-29-07 MOAB Confirmation							
TRI 257							

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10			12		
	TRICON EXHIBITS (Continued) NUMBER AND DESCRIPTION	PAGE		TRICON EXHIBITS (Continued) NUMBER AND DESCRIPTION	PAGE
1	Exhibit 21..... --		1	Exhibit 39..... --	
2	9-3-08 Email from Brad Lockwood to Sa Uk Chang		2	9-13-10 Amended Expert Report of Chuck Matthews	
3	TRI 2559		3	N/A	
4			4		
5			5	Exhibit 40..... --	
6	Exhibit 22..... --		6	C.V. of Chuck Matthews	
7	9-4-08 Email from Sa Uk Chang to Brad Lockwood, forwarding email from MJ Hwang		7	N/A	
8	TRI 2553-2554		8	Exhibit 41..... 538	
9			9	Handwritten calculations made during the arbitration	
10			10		
11	Exhibit 23..... --		11	VINMAR EXHIBITS	
12	10-2-08 Email string between WS Shim and Gigi Ren, cc'ing others		12	NUMBER AND DESCRIPTION	PAGE
13	TRI 2618-2628		13	Exhibit 1..... --	
14			14	7-22-08 MOAB's Handwritten Note MOAB 1, Depo Ex. 7	
15	Exhibit 24..... --		15	Exhibit 2..... --	
16	10-20-08 Invoices, inspection reports, bills of lading, and certifications reflecting purchase of MX by Tricon Energy		16	7-22-08 Email from R. Wilson to N. Smith regarding MX VIN 118-VIN 119	
17	TRI 303-315		17	Exhibit 3..... --	
18			18	7-22-08 Email from B. Lockwood to H. Chapa regarding Vinmar/Rick Wilson TRI 1-TRI 2, Depo Ex 13	
19	Exhibit 25..... --		19	Exhibit 4..... --	
20	10-20-08 Bill of lading and certificates of inspection reflecting transfer of MX		20	7-24-08 Vinmar's SAP Data VIN 91; VIN 93-VIN 94	
21	TRI 2557-2584		21	Exhibit 5..... --	
22			22	7-29-08 Email from R. Wilson to L. Pascu with V. Rajevac contact information VIN 116-VIN 117	
23	Exhibit 26..... --		23		
24	12-1-08 MX price quotations		24		
25	TRI 35		25		
11			13		
	TRICON EXHIBITS (Continued) NUMBER AND DESCRIPTION	PAGE		VINMAR EXHIBITS (Continued) NUMBER AND DESCRIPTION	PAGE
1	Exhibit 30..... --		1	Exhibit 6..... --	
2	11-11-09 MOAB Confirmation		2	7-31-08 Email from D. Mehta to E. Leyman regarding US origin MX MOAB 20-MOAB 21	
3	TRI 186		3		
4			4	Exhibit 7..... --	
5	Exhibit 31..... --		5	8-6-08 Email from R. Wilson to H. Goradia regarding Tricon Communication: Draft to discuss VIN 59	
6	11-25-09 MOAB Confirmation		6		
7	TRI 179		7	Exhibit 8..... --	
8	Exhibit 32..... --		8	8-6-08 Email from R. Wilson to B. Lockwood re Vinmar MX Purchase Sale VIN 180-VIN 181	
9	12-16-09 Email from Ben Morse to Brad Lockwood, attaching daily MX pricing		9		
10	TRI 58-61		10	Exhibit 9..... --	
11			11	8/25/08 Email from B. Lockwood to B. Lockwood regarding Yahoo correspondence between E. Leyman and B. Lockwood	
12	Exhibit 34..... --		12	TRI 43-TRI 51	
13	6-21-10 Vinmar's Responses to Tricon's Fourth Requests for Production		13		
14	N/A		14	Exhibit 10..... --	
15			15	8-8-08 Email from B. Lockwood to M. Antonovich regarding Vinmar/Tricon MX Contract	
16	Exhibit 35..... --		16	TRI 22-TRI 23	
17	6-21-10 Vinmar's Responses to Tricon's Fourth Interrogatory Requests		17		
18	N/A		18	Exhibit 11..... --	
19	Exhibit 36..... --		19	8-11-08 Email from B. Lockwood to M. Antonovich regarding vessel nomination	
20	7-12-10 Expert Report of Steve Simpson		20	VIN 43-VIN 48	
21	N/A				
22	Exhibit 37..... --		21	Exhibit 12..... --	
23	1-22-09 - 8-16-10 Tricon's Attorneys' Fees Invoices		22	8-22-08 Email from B. Lockwood to M. Antonovich regarding Vessel Nomination 5000 MT MX under Contract	
24	TRI 2791-2859		23	SA1230-0708HOU	
25			24	TRI 27-TRI 29	
			25		

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1	2	3	PAGE	4	5
1	2	3	VINMAR EXHIBITS (Continued)	4	(8:50 a.m.)
1	2	3	NUMBER AND DESCRIPTION	4	JUDGE BENTON: Let's go ahead and go on
1	2	3	Exhibit 13..... --	4	the record. We're now on the record in the arbitration
1	2	3	7-23-08 - 9-30-08 Tricon redacted	4	matter of Tricon Energy, Limited, Claimant, versus
1	2	3	Inventory Log	4	Vinmar International, Limited, Respondent.
1	2	3	TRI 353-TRI 391	4	
5	6	7	Exhibit 14..... --	8	I am Levi Benton, the panel chair, joined,
5	6	7	6-15-10 Letter from T. Larson to	8	of course, this morning by two other arbitrators. To my
5	6	7	S. Lee re: Discovery	8	right, Judge Sharolyn Wood, to my left, Judge Mark
5	6	7	N/A	9	Davidson.
8	9	10	Exhibit 15..... --	11	Before we get into other housekeeping
8	9	10	7-22-08 MOAB Oct. 2, 2008 invoice	11	matters, Mr. Diaz-Arrastia, you are -- you represent the
8	9	10	TRI 97	12	claimant. Why don't you announce yourself on the record
10	11	12	Exhibit 16..... --	13	and tell us who's with you?
10	11	12	8-11-08 - 2-4-09 Lockwood/Leyman IMs	14	MR. DIAZ-ARRASTIA: Thank you, Judge
10	11	12	TRI 277-TRI 285	15	Benton. I am George Diaz-Arrastia. I represent the
12	13	14	Exhibit 17..... --	16	claimant, Tricon Energy, Limited. With me is Tracy
12	13	14	7-20-08 Tricon/KP Chemical Corp.	17	Larson from my office, Mr. Brad Lockwood, who is the
13	14	15	contract	18	representative of Tricon, and Ms. Dana Hodges and
13	14	15	TRI 299-TRI 302	19	Ms. Myra Mendez from my office.
14	15	16	Exhibit 18..... --	20	JUDGE BENTON: Okay. Mr. Lee?
14	15	16	9-24-08 Email from J. Lee to	21	MR. LEE: Yes, Your Honor. And do you
14	15	16	B. Lockwood, S. Chang re Sales	22	mind if we -- okay. I want to make sure we do it right.
14	15	16	confirmation for MX SKT in 2H October	23	Stephen Lee on behalf of Vinmar.
14	15	16	TRI 780-TRI 784	24	And I need to go ahead and make sure that
17	18	19	Exhibit 19..... --	25	the record is clear. I think we've objected to
17	18	19	9-23-08 Email from P. Kyle to G. Ren,		
17	18	19	V. Rajevac, A. Bansal, B. Lockwood,		
17	18	19	S. Chang regarding Ship nomination		
17	18	19	request		
20	21	22	TRI 2549		
20	21	22	Exhibit 20..... --		
20	21	22	10-20-08 Commercial Invoice from J&J		
20	21	22	Chemtrading to Tricon for 3,200 MT of		
20	21	22	Mixed Xylene		
20	21	22	TRI 2199		
23	24	25			
23	24	25			
		15			17
1	2	3	PAGE	4	5
1	2	3	VINMAR EXHIBITS (Continued)	4	arbitration from the very beginning. Our presence here
1	2	3	NUMBER AND DESCRIPTION	5	is subject to and without waiver of that arbitration
1	2	3	Exhibit 21..... --	6	objection.
1	2	3	10-20-08 Commercial Invoice from J&J	7	JUDGE BENTON: Right.
1	2	3	Chemtrading to Tricon for 570.042 MT	8	MR. LEE: I would really like to dispense
1	2	3	of Mixed Xylene	9	with having to object all the way through if I could get
1	2	3	TRI 2203	10	the panel's acknowledgment that we've at least filed an
4	5	6	Exhibit 22..... --	11	objection and that everybody is aware of that.
4	5	6	10-23-08 Commercial Invoice from J&J	12	JUDGE BENTON: It is so acknowledged and
4	5	6	Chemtrading to Tricon for 950.010 MT	13	we're going to address that in just a few minutes.
4	5	6	of Mixed Xylene	14	MR. LEE: Thank you. Stephen Lee. I'm
4	5	6	TRI 2204	15	lead counsel for Vinmar. Blake Runions from my office
9	10	11	Exhibit 23..... --	16	is an associate, will be helping us. And Mark
9	10	11	10-27-08 Email from W. Shim to G. Ren,	17	Antonovich, who is the general counsel at Vinmar, is here
9	10	11	V. Rajevac, C. Trammell, B. Lockwood &	18	as a representative.
11	12	13	S. Chang re Vessel nomination 5KT MX	19	JUDGE BENTON: Yeah. And I'll -- whatever
11	12	13	TRI 2585-TRI 2590	20	happens following the hearing of your motion to dismiss
12	13	14	Exhibit 24..... --	21	in the event that -- I'm going to say this now because I
12	13	14	2-22-10 Tricon Energy, Ltd.'s	22	might forget. In the event that we conclude that your
13	14	15	Objections and Responses to Vinmar	23	motion to dismiss is without merit, you have a running
13	14	15	International, Ltd.'s First Request	24	objection throughout these proceedings so that you need
14	15	16	for Admissions	25	not continue to assert it. And you are fine with that.
14	15	16	N/A		Correct, Mr. Diaz-Arrastia?
15	16	17	Exhibit 25..... --		MR. DIAZ-ARRASTIA: Yes, Your Honor.
15	16	17	2-22-10 Tricon Energy, Ltd.'s		
15	16	17	Objections and Responses to Vinmar		
15	16	17	International, Ltd.'s First		
15	16	17	Interrogatory Requests		
18	19	20	N/A		
18	19	20	Exhibit 26..... --		
18	19	20	Blank July 2008 Calendar		
20	21	22	N/A		
20	21	22	Exhibit 27..... 214		
20	21	22	Handwritten calculations made during		
22	23	24	the arbitration		
22	23	24	Exhibit 28..... 219		
22	23	24	Handwritten calculations made during		
24	25	25	the arbitration		

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<p style="text-align: right;">18</p> <p>1 JUDGE BENTON: All right. Just kind of -- 2 I guess I'll call it housekeeping. To give you a sense 3 of where we want to go this morning, we do want to first 4 hear argument. And if you -- if it's your desire to put 5 on evidence, I guess we want to hear that related to the 6 motion to dismiss.</p> <p>7 I don't know whether you intend to put on 8 any evidence to support your motion to dismiss, but 9 whatever time it takes for -- well, let's assume that we 10 will --</p> <p>11 MR. DIAZ-ARRASTIA: Your Honor, if I may 12 interject, it is our intention to put on evidence to 13 address the jurisdiction of this panel. The problem 14 that we have, as we have pointed out various times, is 15 that in order for us to put on the evidence to address 16 jurisdiction really requires putting on all of the 17 evidence on the merits of the case excepting the damages 18 evidence and that's why we have believed that the 19 jurisdictional issue should be carried with the merits 20 and decided together.</p> <p>21 JUDGE BENTON: I understand that.</p> <p>22 MR. DIAZ-ARRASTIA: Now, we do have 23 argument -- and I can show you some of the documents 24 that we think are important and I'm prepared to do that 25 this morning.</p>	<p>1 JUDGE BENTON: It's almost 9:00 o'clock. 2 We would like to take a restroom break about 10:30 3 unless we have taken a break before then. We'll 4 likely -- depending on how the day goes, we'll likely 5 break for lunch around noon and then we'll just see 6 where we are from there.</p> <p>7 Judge Wood, anything you want to add?</p> <p>8 Judge Davidson?</p> <p>9 JUDGE DAVIDSON: Let's go.</p> <p>10 JUDGE BENTON: Okay. Do you want to make 11 a brief open relating to your motion to dismiss, 12 Mr. Lee, or do you just want to roll your sleeves up and 13 get going?</p> <p>14 And, by the way, it's a little warm to me 15 in here. You're welcome to remove coats at any time. 16 You need not ask our permission.</p> <p>17 OPENING REMARKS ON BEHALF OF THE RESPONDENT</p> <p>18 MR. LEE: Thank you, Your Honor. I 19 would -- I think instead of just giving you a brief 20 opening, I'm prepared to argue the motion.</p> <p>21 I think the evidence that I need is 22 already before the panel. Tricon bases its claim in 23 this case -- a breach of contract case against Vinmar 24 and their entire case is based on the argument that an 25 agreement was formed on July the 22nd, 2008.</p>
<p style="text-align: right;">19</p> <p>1 JUDGE BENTON: I understand your 2 perspective. Let me tell you how we're going to 3 proceed. We're going to -- inasmuch as it's their 4 motion to dismiss, we're going to give Vinmar the 5 opportunity to put on their motion to dismiss.</p> <p>6 It is their motion to dismiss. And so to 7 the extent they wish to put on evidence in support of 8 their motion to dismiss, we'll afford them the 9 opportunity to do that. When they rest on their motion 10 to dismiss, you in turn will have the right to put on 11 evidence of -- or evidence in opposition to their motion 12 to dismiss.</p> <p>13 I understand now that it may well be -- or 14 we understand now that it may well be that your desire 15 is to put on the entire case -- your entire case on the 16 merits. We need not answer now as to liability -- 17 (Brief discussion off the record.)</p> <p>18 JUDGE BENTON: Right. The merits of the 19 case less liability.</p> <p>20 On the other hand, at the conclusion of 21 the presentation -- or their presentation on their 22 motion to dismiss, you might change your mind about 23 whether or not you want to put on your entire case. We 24 shall see.</p> <p>25 MR. DIAZ-ARRASTIA: Okay.</p>	<p>1 A broker by the name of Ed Leyman -- this 2 is sort of an unusual situation in that the parties 3 never talked. All of the communications were done 4 through a broker, a gentleman by the name of Ed Leyman, 5 MOAB Oil. And Mr. Leyman purported to arrange a deal 6 between the parties.</p> <p>7 It's our contention that he missed a 8 crucial term and that the terms didn't match and there 9 was, in fact, no mutual assent. But importantly for the 10 motion to dismiss is the fact that Mr. Leyman claimed 11 that a contract existed between the parties. He sent 12 out a written confirmation of that agreement and Tricon 13 bases claim on that document.</p> <p>14 The request for admission responses say 15 that the -- they believe that the confirmation is a 16 binding contract. Their pleadings, the specification of 17 claims that's before the panel says that the 18 confirmation is a binding contract.</p> <p>19 The confirmation itself does not contain 20 an arbitration agreement and everybody's admitted that. 21 There is no arbitration agreement in the four corners of 22 the broker confirmation that Tricon bases its entire 23 case upon. Texas law is clear. If you claim that a 24 contract was formed at the time the contract is formed, 25 there -- you can't supplement that document with</p>
	<p style="text-align: right;">21</p> <p>6 (Pages 18 to 21)</p>

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<p style="text-align: right;">22</p> <p>1 additional contract claims.</p> <p>2 Tricon's position is we have a</p> <p>3 confirmation but then we sent a sales contract and the</p> <p>4 sales contract contained an arbitration provision and so</p> <p>5 we're going to supplement the confirmation with our</p> <p>6 terms of the sales contract.</p> <p>7 And there's a couple of big problems with</p> <p>8 that. One, 2-207, which is the first argument that</p> <p>9 Tricon put out there, which is the battle that forms UCC</p> <p>10 provision, Texas law, there's a number of cases that we</p> <p>11 cite in our motion to dismiss that say that you cannot</p> <p>12 resort to Section 2-207, the battle forms section if, in</p> <p>13 fact, there is already an agreement.</p> <p>14 And Tricon's case is and claim is that</p> <p>15 there was already an agreement that was documented by</p> <p>16 the broker. They claim that that broker confirmation</p> <p>17 satisfies the statute of fraud. So if they're correct</p> <p>18 and that's what their case is based on, the contract</p> <p>19 claim is the broker confirmation without an arbitration</p> <p>20 provision.</p> <p>21 In addition to that, you cannot read the</p> <p>22 sales contract that Tricon sent in conjunction with the</p> <p>23 broker confirmation because the sales contract itself on</p> <p>24 its face says, "This document cancels and supersedes the</p> <p>25 broker confirmation."</p>	<p style="text-align: right;">24</p> <p>1 fundamental question for the panel and certainly</p> <p>2 something that first must be decided by a Court because</p> <p>3 the case is entirely based on a broker confirmation --</p> <p>4 an agreement on July the 22nd between the parties orally</p> <p>5 that was confirmed by a broker confirmation. That's</p> <p>6 what the case is based upon.</p> <p>7 There's no arbitration provision. And so</p> <p>8 I don't even think they get to the question of, well, do</p> <p>9 you include the sales contract? Do you include other</p> <p>10 terms? Well, that's a matter for a Court to decide.</p> <p>11 We've been very clear about this from the</p> <p>12 beginning, that we objected to arbitration. Texas law</p> <p>13 provide -- and we've been clear about our remedies, too,</p> <p>14 that if they wanted to proceed in arbitration they were</p> <p>15 doing so at the risk of our ability to move to vacate</p> <p>16 the panel's award if it was against us because there was</p> <p>17 never jurisdiction in the first place.</p> <p>18 And so I think that the fundamental</p> <p>19 question here and where we are is Tricon puts the cart</p> <p>20 before the horse. They want to run into arbitration and</p> <p>21 try the whole case and see if they can get the panel to</p> <p>22 give them relief when the question of whether the panel</p> <p>23 has jurisdiction or not has not been decided.</p> <p>24 And so I think, Your Honors, with the</p> <p>25 specification of claims making it clear that their case</p>
<p style="text-align: right;">23</p> <p>1 So if -- you can't read them together.</p> <p>2 They cannot be read as a -- the sales contract as a</p> <p>3 supplement to the confirmation. But the jurisdictional</p> <p>4 problem that we have is Texas case law makes it clear</p> <p>5 that gateway matters such as whether there is an</p> <p>6 arbitration agreement or not is a matter that is</p> <p>7 reserved exclusively for the Courts.</p> <p>8 A Court has to make a decision, Is there a</p> <p>9 contract? And if there is, is there an arbitration</p> <p>10 provision? And those decisions must be made before a</p> <p>11 panel has arb -- has jurisdiction to hear this claim.</p> <p>12 And that's -- it goes back to the fundamental premise of</p> <p>13 arbitration, which is that it's an -- it's a breach of</p> <p>14 contract.</p> <p>15 The parties have to agree to arbitrate and</p> <p>16 you can't force arbitration upon somebody that hasn't</p> <p>17 agreed to that. And so the question under Texas law --</p> <p>18 and we've cited a number of cases that deal with this</p> <p>19 issue, when the question is whether there is an</p> <p>20 agreement in the first place. That question is for the</p> <p>21 Courts to decide.</p> <p>22 And even if there's an agreement, then the</p> <p>23 next question is, what is -- what does the agreement</p> <p>24 include? Does it include an arbitration provision or</p> <p>25 not? And in this case, it's really a fairly -- it's a</p>	<p style="text-align: right;">25</p> <p>1 is based on broker confirmation, all of the testimony</p> <p>2 from their witnesses, their request for admission</p> <p>3 responses, their interrogatory answers all say, "Yes, we</p> <p>4 believe the broker confirmation" -- the one-page broker</p> <p>5 confirmation that they say outlines the terms of the</p> <p>6 deal is a binding contract and there is no arbitration</p> <p>7 agreement in that document.</p> <p>8 And I would just point you to -- it's</p> <p>9 already in the record in their pleadings, but if you</p> <p>10 were to look at Joint Exhibit No. 4 in your binders,</p> <p>11 this is the final confirmation from the broker and we</p> <p>12 can all look at it. There is no arbitration provision</p> <p>13 in that document.</p> <p>14 So we believe that the appropriate remedy</p> <p>15 here is for the panel to dismiss this case until Tricon</p> <p>16 deals with the jurisdictional question. And because the</p> <p>17 Court is going to decide a number of issues that may or</p> <p>18 may not be -- that will impact arbitration one way or</p> <p>19 the other -- either the Court decides there is no</p> <p>20 agreement and there never was an agreement so there's no</p> <p>21 arbitration or the Court may define what the contract is</p> <p>22 and if that contract includes an arbitration provision,</p> <p>23 then we will have an arbitration hearing.</p> <p>24 But what you try in arbitration, how it's</p> <p>25 tried and the scope of that all needs to be decided</p>

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<p>26</p> <p>1 first by a Court and otherwise I don't see how you can 2 get to a point where you can come to an award that is 3 based on jurisdiction.</p> <p>4 JUDGE BENTON: Judge Wood, any questions 5 for Mr. Lee?</p> <p>6 JUDGE WOOD: Not at this time.</p> <p>7 JUDGE BENTON: Judge Davidson?</p> <p>8 JUDGE DAVIDSON: Not now.</p> <p>9 JUDGE BENTON: Mr. Lee, do you I suppose 10 therefore rest on your motion to dismiss?</p> <p>11 MR. LEE: Yes, Your Honor.</p> <p>12 JUDGE BENTON: Mr. Diaz-Arrastia?</p> <p>13 MR. DIAZ-ARRASTIA: Thank you, Your Honor.</p> <p>14 OPENING REMARKS ON BEHALF OF THE CLAIMANT</p> <p>15 MR. DIAZ-ARRASTIA: Let me first address 16 the question of jurisdiction. There is no question 17 under Texas law that this panel has the authority to 18 decide its own jurisdiction. That is clearly stated in 19 the Triple A rules and it is also the Texas law. 20 If Vinmar had filed a motion to stay this 21 arbitration, then Mr. Lee is correct that the Court 22 would decide whether this case was subject to 23 arbitration, but Vinmar has chosen not to do that. It 24 is very clearly not the law in Texas that where the 25 opponent to arbitration chooses not to go to Court to</p>	<p>28</p> <p>1 argument. If we could turn on the projector, I will be 2 showing the panel some of the documents. This is a very 3 simple UCC breach of contract case.</p> <p>4 What happened here is that Vinmar bought 5 mixed xylenes, which we've referred to as MX, betting 6 that the price would go up, but what happened instead is 7 that the price went into a long and precipitous decline. 8 By the delivery date that was negotiated in the 9 contract, the price of MX had fallen more than 25 percent.</p> <p>11 By the end of the year of 2008, the price 12 of MX had fallen to more than 65 percent. It was really 13 a precipitous decline. And the price fell almost every 14 day. MX tends to track the price of crude oil and we 15 all know what happened to crude oil in the second half 16 of 2008.</p> <p>17 Vinmar refused to accept the MX on a very 18 bad deal and they didn't perform, but that's a breach of 19 contract. Let's look at the -- at the arguments. And 20 it is correct, first of all, the UCC very much favors 21 the sale -- the formation of contracts and this favors 22 formality.</p> <p>23 If you could take a look at 2-204(A). And 24 there it says it very clearly. This is the policy of 25 the UCC with regard to contract formation. A contract</p>
<p>27</p> <p>1 seek a stay, the proponent, Tricon in this case, has an 2 obligation to seek an order compelling it.</p> <p>3 This case was actually -- this issue was 4 specifically addressed just in July by the Corpus 5 Christi Court of Appeal in the In Re: Rio Grande Xarine 6 case, which was cited in our brief in response to the 7 motion to arbitration and we've actually done a 8 supplemental brief to the panel that I will hand to you 9 right now, but it's mostly based on the Rio Grande case. 10 And the conclusion of the Rio Grande case 11 with regard to the argument that Mr. Lee is making -- I 12 hate to say it, but it's one word. They said it was 13 nonsensical.</p> <p>14 MR. LEE: Do you have -- 15 JUDGE WOOD: Does Mr. Lee have a copy? 16 MR. LEE: -- a copy for me? 17 MR. DIAZ-ARRASTIA: Oh, I'm sorry. 18 What they said is it was nonsensical. 19 This panel can decide its own jurisdiction and this 20 panel does not have to wait for a Court to tell it it 21 has jurisdiction. Tricon as the proponent of 22 arbitration has no obligation to first institute 23 litigation in a Court to get an order compelling the 24 arbitration. 25 Let me address now the merits of Mr. Lee's</p>	<p>29</p> <p>1 for the sale of goods may be made in any manner 2 sufficient to show agreement, including conduct by both 3 parties which recognizes the existence of such a 4 contract.</p> <p>5 Mr. Lee is right. Here the contract was 6 made through a broker and the parties did not 7 communicate with each other prior to the deal being 8 made. That is not unusual in petrochemicals trading and 9 there will be evidence of that from testimony.</p> <p>10 In this case, the agent was the 11 broker -- the broker, I'm sorry, was the agent for both 12 sides. And we have actually cited in our prehearing 13 briefing the Den Norske case, which was a decision by 14 Judge Hughes in the Southern District of Texas, where he 15 said that's exactly right.</p> <p>16 And what that means is that when the 17 broker says that there's a deal there's a deal and 18 that's an enforceable contract. The broker in this case 19 was Mr. Ed Leyman. We're going to see him by a video 20 deposition. He is probably the leading MX trader in the 21 United States.</p> <p>22 On July 22, 2008, through instant message 23 communications and telephone communications, Mr. Leyman 24 brokered a deal. The terms of the deal was that Tricon 25 was going to sell MX to Vinmar. Both of these parties</p>

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<p style="text-align: right;">30</p> <p>1 are trading companies. It was 5,000 metric tons of MX 2 at the price of 1310 -- \$1,310 per metric ton, a tight 3 delivery window, some -- in the first half of September, 4 between September 1st and September 15th, CFR Korea or 5 Taiwan with Vinmar to declare the discharge port, 6 meaning where in Korea or Taiwan the MX was going to be 7 unloaded by the 8th of August.</p> <p>8 And the evidence that you're going to hear 9 from Mr. Leyman and Mr. Lockwood is the delivery window 10 was particularly important, particularly important. 11 That is important because it takes 30 to 45 days to move 12 a vessel from the Gulf of Mexico to Korea or Taiwan and 13 can take longer than that if you have delays in the 14 Panama Canal, if you have bad weather.</p> <p>15 So if you're going to be declaring your 16 discharge port and you have a guaranteed delivery by the 17 15th of September, you have a very tight window, and 18 that is why we believe that we had to keep the option to 19 substitute Asian origin if our vessel slipped.</p> <p>20 This is an extension of frauds case. It 21 involves more than \$500, and that means that we need a 22 writing and we need a signature. As we know, a writing 23 is not required under the law to be a single document 24 and here we have several documents that form all of the 25 contracts.</p>	<p style="text-align: right;">32</p> <p>1 binders as well under Joint Exhibit 2. It's difficult 2 to read the copy. 3 MR. DIAZ-ARRASTIA: It is the initial 4 confirm that was sent by Mr. Leyman to both Vinmar and 5 Tricon on July 22nd after the deal was made. It 6 contains all of the essential terms of the contract, 7 quantity, quality, delivery, payment, terms and a number 8 of other things, everything required to make a deal. 9 I will point out on the top right-hand 10 corner there's the MOAB letterhead. That's a signature 11 under the UCC. Under the UCC, a signature may be 12 anywhere on a piece of paper and it can be a billhead or 13 a letterhead and MOAB was the agent for both sides so 14 that is official. 15 That was Judge Hughes' decision in the Den 16 Norske case, exactly that. Nothing in here talks about 17 U.S. origin. And there will be evidence that if 18 U.S. origin was a critical term of the deal it would be 19 in the confirm, it would be in the firm bid given by 20 Vinmar and it would be in the deal. 21 And let me just give you an example of a 22 case where that is done. If we can look at Tricon 23 Exhibit 1 quickly, please. 24 MR. LEE: If I may just make one 25 statement. I hate to interrupt his presentation, but we</p>
<p style="text-align: right;">31</p> <p>1 Second is the signature, but under the UCC 2 signature is very, very broad. If we can take a look at 3 2-201, Comment 1, please. Let's see. It must be 4 signed. It must be signed, a word which includes any 5 authentication which identifies the party to be charged. 6 Let's look at 1201(37). This is the 7 definition of signed under the UCC. Signed includes 8 using any symbol executed or adopted with present 9 intention to adopt or accept a writing. 10 Now let's take a look at Comment 37. 11 There you go -- Signed does not require a complete 12 signature. The symbol may be printed, stamped or 13 written. And in an appropriate case, it may be found on 14 a billhead or letterhead. 15 So it's very, very clear that for the UCC 16 a signature doesn't mean that somebody took a pen and 17 wrote his name down on a piece of paper. It can be even 18 just a letterhead. Let's take a look at some of the key 19 documents here. 20 Let's first look at Joint Exhibit No. 2. 21 Is there any way so that we can get that on the screen 22 all at once? Fit to page. There you go. 23 That is the principal document. That is 24 the initial confirm that was -- 25 MS. LARSON: Your Honors, they're in the</p>	<p style="text-align: right;">33</p> <p>1 do have some objections to their exhibits, including 2 this one. I just want to note that for the panel. I 3 don't think this has anything to do with this 4 proceeding, but I didn't want him to show that without 5 at least noting the objection. 6 JUDGE BENTON: All right. 7 MR. DIAZ-ARRASTIA: Okay. And if you -- 8 Tracy, if you could highlight during quality and maybe 9 zoom in on that. 10 Product to be U.S. origin. That's the way 11 it's done if origin is important. It is important -- if 12 origin is important to the buyer it would be put up 13 front because it affects delivery. As I said before, if 14 you were loading a vessel on August the 8th in the Gulf 15 and you needed to get it to Taiwan by September 15th, 16 you might not make it. 17 Now, there are actually three confirms in 18 this case. Let's first take a look at Joint Exhibit 3. 19 The evidence is going to be that after the first confirm 20 on July 22nd, on the same day, Mr. Wilson, the trader 21 for Vinmar, requested a change in the payment terms from 22 a 30-day to an at site letter of credit. That was 23 agreed to by Mr. Lockwood and the deal was modified. 24 JUDGE BENTON: Yeah, let me -- let me 25 interrupt just for a second. Providing -- I don't</p>

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<p>34</p> <p>1 know -- I don't -- I don't want to prejudice your 2 presentation, but to the extent you could partition 3 these issues of the merits and the jurisdictional 4 argument, it would really help us to focus.</p> <p>5 MR. DIAZ-ARRASTIA: Well, Your Honor, the 6 problem that we have is that it's very hard to do that. 7 One of the reasons why Vinmar claims that a contract was 8 never made is because U.S. origin was a material term of 9 that contract that was not agreed to so I have to 10 address it.</p> <p>11 JUDGE BENTON: All right. Very good.</p> <p>12 MR. DIAZ-ARRASTIA: And I'm trying to go 13 in chronological order through the documentation.</p> <p>14 JUDGE BENTON: Okay.</p> <p>15 MR. DIAZ-ARRASTIA: But in any event, 16 there was one modification on July 22nd to change the 17 payment terms, but even on this second confirm that was 18 again sent to both sides, again there's no mention of 19 U.S. origin.</p> <p>20 Then let's go to Joint Exhibit No. 4, and 21 this is the last confirm, which is the one that was 22 referred to by Mr. Lee, also exchanged by both parties. 23 And what happened here is that Mr. Lockwood noticed that 24 there was a mistake on the price term.</p> <p>25 The price on the initial two confirms</p>	<p>36</p> <p>1 change in the payment terms and that was agreed to. 2 There's nothing that says that the parties can't agree 3 to modifications if that's what they want to do. 4 And this is what happened. On 5 July 23rd -- let's go to Exhibit J 5, please, Joint 6 Exhibit 5, and actually let's start there on that page 7 there towards the bottom of it where it Brad's e-mail to 8 Rick Wilson.</p> <p>9 On July 23rd, the day after the deal was 10 initially made, Tricon sends its sale contract -- and we 11 have been referring to that in the briefing as Tricon 12 letter, but sends this to Rick Wilson. There's the 13 cover e-mail that we're looking at right now. And I am 14 just pointing that out to you to show the date and to 15 also show you that it is signed. There's an e-mail 16 signature that is a sufficient signature under the UCC. 17 Let's go to the first page after that. 18 Here it contains the essential terms. And it does not 19 change the essential terms of the contract, the price, 20 quantity, delivery, payment, et cetera. It does not 21 change that from the MOAB confirms. It's the same 22 thing.</p> <p>23 We'll go to the next page. It does 24 contain the general terms and conditions of sale, 25 additional terms to the contract. There is going to be</p>
<p>35</p> <p>1 said -- was 1110 a metric ton when everybody agreed that 2 it was 1310. Mr. Lockwood called Mr. Leyman and said, 3 "Hey, there's a mistake on the price. Can you fix 4 that?" And it was fixed and that resulted in the third 5 confirm.</p> <p>6 Three confirms exchanged between the 7 parties on July 22nd. They contain all of the essential 8 terms of the deal. And it is our position that the 9 contract was initially made on July 22nd and it is 10 memorialized in writing with a signature in these 11 documents, but it is not true that once that happens the 12 parties are bound or are prevented by Texas law from 13 modifying the contract or adding additional terms.</p> <p>14 If we could take a look at UCC 2-209. And 15 there you go. An agreement -- Under the UCC, an 16 agreement modifying the contract within this chapter 17 needs no consideration to be binding. So under the UCC, 18 the parties can modify their contract at any time and 19 there's no requirement for consideration or any other 20 formality. The policy of the US -- UCC disfavors 21 formality.</p> <p>22 What happens in this case is that 23 additional terms were negotiated and there were 24 modifications made and certainly one of the 25 modifications made was that Vinmar requested for a</p>	<p>37</p> <p>1 evidence that this is a very common thing to do in 2 petrochemicals trading, that after you do the confirm 3 and you have a deal you pass paper between yourselves. 4 You send the terms and conditions of sale. Arbitration 5 is contained here, Paragraph 9 of the terms and 6 conditions of sale.</p> <p>7 On July 24th, the following day, 8 Mr. Wilson gives this letter to Laurentiu Pascu who 9 we'll hear from a video. He was Vinmar's operations 10 specialist. They take care of the deal once the trader 11 makes it to free up the trader to do more deals.</p> <p>12 Take a look at Exhibit J 9, Joint 13 Exhibit 9. This is Mr. Pascu's e-mail to Rick Wilson in 14 the morning of July 29th, a few days after he received 15 the terms and conditions containing arbitration. He is 16 informing Mr. Wilson of his comments on the additional 17 terms.</p> <p>18 JUDGE WOOD: Give me that exhibit number 19 again.</p> <p>20 MR. DIAZ-ARRASTIA: It's Joint Exhibit 9. 21 A few hours later, Mr. Pascu sends his 22 comments to Vuk Rajevac, who we will also hear from. 23 Mr. Rajevac is Tricon's operations specialist in this 24 period, Mr. Pascu's counter-partner.</p> <p>25 We can look at Joint Exhibit 13 now. And</p>

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<p>1 that's what Mr. Pascu tells Mr. Rajevac. Please enclose 2 our comments under sale confirmation. We shall revert 3 soon with our purchase order for your review.</p> <p>4 Now, there's going to be evidence that no 5 one prepares and sends a pur -- says, "I'll send a 6 purchase order," if they didn't think they had a deal. 7 Obviously Mr. Rajevac thinks they had a deal. Let's 8 take a look at what Mr. Rajevac enclosed with this 9 e-mail on July 29.</p> <p>10 What -- I would also point out that -- I'm 11 sorry, Mr. Pascu. I would also point out that 12 Mr. Pascu's e-mail is signed. That's that signature 13 within the UCC. If we could put it full -- so that we 14 can see it on the full page.</p> <p>15 And we're going to go over this during the 16 evidence phase, but there is evidence that all -- that 17 that handwriting that you see on the Tricon letter on 18 the additional terms and conditions is Mr. Pascu's 19 handwriting. As you can see, he is scratching some 20 things out. He is asking for some things to be changed.</p> <p>21 Look in the next page. Again, 22 more changes and comments that Mr. Pascu makes on the 23 Tricon terms and conditions. If you will look at the 24 next page on Paragraph 9, nothing on arbitration. He 25 does not have a problem with it. And nowhere in here is</p>	<p>1 of those terms on which the writings of the parties 2 agree, but not the ones you don't agree to. 3 So as of July 29th, 2008, there was a 4 contract that consisted of all of the terms that the 5 parties agreed to and not the terms that they did not 6 agree to. Nowhere in there was there an agreement about 7 U.S. origin. There absolutely was an agreement about 8 arbitration. And the only term that the parties 9 discussed that they didn't agree to was demurrage time 10 bar. That's just not part of the contract, but that 11 doesn't mean that there is no contract. 12 As I said, Your Honor, I have alluded to 13 some of the evidence that is going to be heard. It is 14 intertwined with the merits of this case in a way 15 they -- if we want to create a full record of how this 16 contract was made, we're going to have to hear all of 17 the evidence except for my damages evidence, but this is 18 a preview of what you're going to hear.</p> <p>19 JUDGE BENTON: All right. Any questions, 20 Judge Wood, for Mr. Diaz-Arrastia?</p> <p>21 JUDGE WOOD: Not at this time.</p> <p>22 JUDGE BENTON: Judge Davidson?</p> <p>23 JUDGE DAVIDSON: Nope.</p> <p>24 JUDGE BENTON: Mr. Diaz-Arrastia, do 25 you -- excuse me -- for the purposes of the record, rest</p>
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<p>1 there any mention of origin. 2 About 30 minutes later we get to 3 exhibit -- Joint Exhibit 14. And this is their response 4 that Mr. Rajevac sends to Mr. Pascu. And that is it. 5 He says, "Your comments on the contract are well noted 6 and accepted except for demurrage time bar which is 90 7 days." And, again, it's signed. 8 So at this moment, what we have is we have 9 a contract that was initially made on July 22nd and 10 which was modified by agreement of the parties on 11 July 29th. Some of the things that are contained in it 12 were requested by Tricon. Some of the things were 13 requested by Vinmar, but everything was agreed to with 14 the sole exception being demurrage. There was no 15 agreement on the demurrage time bar, but that is not 16 relevant in this case. There was never any demurrage. 17 Let's talk about 2-207, if you could go 18 back to that for a moment, just UCC 2-207. If you could 19 look at 2-207(B), additional terms are to be construed 20 as proposals for addition to the contract. Let's look 21 at 2-207(C), beginning Conduct by both parties which 22 recognizes the existence of a contract is sufficient to 23 establish a contract for sale although the writings of 24 the parties do not otherwise establish a contract. In 25 such case, the terms of the particular contract consist</p>	<p>1 on your response to their motion to dismiss? 2 MR. DIAZ-ARRASTIA: Your Honor, if you 3 want to hear evidence on how this contract was formed, 4 then I have to put my witnesses on. I have given you a 5 preview of what I am going to say, but I am not able to 6 present my evidence on jurisdiction -- 7 JUDGE BENTON: Okay. 8 MR. DIAZ-ARRASTIA: -- without 9 simultaneously presenting my underlying merits. 10 JUDGE BENTON: I think what we would like 11 to do then is take a short recess for ten to 15 minutes 12 to deliberate upon the arguments that you each have 13 made. And then depending what the two or three of us 14 agree to, we'll come back and announce how we'll -- 15 JUDGE DAVIDSON: Could I ask a question of 16 Mr. Lee? 17 JUDGE BENTON: Certainly. Excuse me. 18 JUDGE DAVIDSON: You've indicated it's 19 your client's position that this panel has no 20 jurisdiction. Correct? 21 MR. LEE: Yes, Your Honor. 22 JUDGE DAVIDSON: Which, if I -- as I 23 understand the laws of jurisdiction therefore, that 24 would mean that should we go through the entire hearing 25 on the merits and determine that you win, make a</p>

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<p style="text-align: right;">42</p> <p>1 determination on the merits that your client owes 2 nothing to Tricon, your argument would be that this 3 panel was without jurisdiction to make such a ruling? 4 MR. LEE: No, Your Honor, because -- well, 5 actually what I would say is the award is enforceable 6 against Tricon because they elected to proceed in this 7 forum. 8 JUDGE DAVIDSON: But jurisdiction isn't 9 something that can be given to anybody by conduct, can 10 it? 11 MR. LEE: I agree, Your Honor, with the 12 exception of it's really two issues. One, it's invited 13 error. I mean, they initiated this proceeding and 14 insisted that it go forward in Triple A. And so if -- I 15 think they're precluded from arguing against an award 16 that the panel might render against them. 17 It doesn't deal -- I don't think it does 18 away with the jurisdiction issue. I think we have a 19 jurisdiction issue that stays with the case throughout, 20 but certainly from Tricon's perspective I think a Court 21 would be fair in saying, "You elected this forum. You 22 invited the panel to make the error. You have to live 23 with that error" -- 24 JUDGE DAVIDSON: Okay. 25 MR. LEE: -- as opposed to us -- may I</p>	<p>1 modification requires all of the elements of contract 2 formation, offer and acceptance to form a modification. 3 Whether there's consideration or not, the UCC says 4 that's not required, but it does require an offer and 5 acceptance. 6 And that question, whether there was an 7 acceptance, whether you could modify the agreement and 8 two, whether there was an acceptance, that is an issue 9 for a Court to decide. 10 JUDGE WOOD: What is the -- is there a 11 joint exhibit number or where in the exhibits is the 12 document that your client sent on their letterhead? 13 MR. LEE: There is no document. 14 JUDGE WOOD: Was there one that Vinmar 15 sent? 16 MR. DIAZ-ARRASTIA: Your Honor, there is a 17 purchase order that Vinmar -- 18 JUDGE WOOD: Purchase order. 19 MR. DIAZ-ARRASTIA: -- prepared but did 20 not send. 21 JUDGE WOOD: Thank you. 22 MR. DIAZ-ARRASTIA: Now, if we could look 23 at that because we do have it and we do intend to 24 present it. 25 JUDGE WOOD: That's in somebody's</p>
<p style="text-align: right;">43</p> <p>1 make one other just quick comment before we break 2 because I think that the question was summed up at the 3 very end of Tricon's presentation, how the contract was 4 formed. That's what counsel said. 5 That question is fundamentally a question 6 for a Court to decide, how the contract was formed. Is 7 there a contract and what terms are included? That's a 8 decision that is for a Court. There are a number of 9 cases that have addressed that. The Rio Grande case is 10 distinguishable for two reasons. 11 Number one, there was no question there 12 was an arbitration agreement in the document that both 13 parties signed. The issue that the complaining party 14 raised is that that document had lapsed. And the Court 15 first found that the arbitration panel had that power to 16 make that decision and then secondly said but, you know, 17 you didn't have to go to Court first. 18 Here we have a separate issue, the 19 fundamental question. Most of the presentation was we 20 had an agreement on July 22nd. The broker confirm 21 satisfies the statute of frauds. That's what we're 22 suing on. 23 This modification argument, by the way, 24 has never -- it's not in any of the pleadings. It's 25 something that came up when we moved to dismiss, but</p>	<p>45</p> <p>1 exhibits? 2 MR. DIAZ-ARRASTIA: Let's take a look at 3 the Vinmar purchase order. Do you remember what that 4 is? 5 JUDGE WOOD: I remember reading -- I 6 remember reading it. 7 MR. DIAZ-ARRASTIA: Let's look at it. 8 JUDGE WOOD: My second question, 9 Mr. Lee -- 10 MR. DIAZ-ARRASTIA: Now, there was -- and 11 Mr. Lee talked about the offer and acceptance. When the 12 Tricon letter was sent by Mr. Lockwood and Mr. Wilson, 13 that's the proposal for a modification. Then when 14 Mr. Pascu commented on that, he accepted some of those 15 terms and made a proposal for modification on other 16 terms. And then when Mr. Rajevac said "Your comments 17 are all accepted," you have an acceptance. 18 JUDGE WOOD: My second question for 19 Mr. Lee goes to -- and I apologize for not finding the 20 case. Okay? But are you familiar with the case that's 21 been decided -- and I thought it was this year. Y'all 22 can figure out probably why. That was in the probate 23 cases. But a recent holding in Texas is that the 24 arbitration panel has to determine whether or not the 25 person that is alleged to contract who may be deceased</p>

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<p style="text-align: center;">46</p> <p>1 now or may now be incompetent, whether that person had 2 capacity to contract by law in Texas now is decided by 3 the arbitrators and not a probate court. I don't know 4 if you would have ran into that case and I don't know 5 where it's even reported. I just -- I just happen to 6 know it was decided.</p> <p>7 MR. DIAZ-ARRASTIA: Your Honor --</p> <p>8 JUDGE WOOD: And y'all can figure out why 9 so you can probably find the Court and then find it --</p> <p>10 MR. DIAZ-ARRASTIA: Your Honor --</p> <p>11 JUDGE WOOD: It's out of Probate Court 12 No. 2 and it's Houston Court of Appeals. I don't 13 remember the first --</p> <p>14 MR. DIAZ-ARRASTIA: Well --</p> <p>15 JUDGE WOOD: But I just didn't know if 16 anybody had been following these cases that -- you know, 17 trying to go back and forth maybe something will --</p> <p>18 MR. DIAZ-ARRASTIA: I don't know that 19 case, Your Honor, but the Vinmar purchase order --</p> <p>20 JUDGE WOOD: There it is.</p> <p>21 MR. DIAZ-ARRASTIA: -- which was prepared 22 but not sent is Tricon Exhibit 10. And if you could 23 look -- Tracy, go down to the dispute resolution 24 provision. I think it is significant that it has the 25 law and arbitration -- and arbitration provision</p>	<p style="text-align: center;">48</p> <p>1 contract formation and what the terms of any contract 2 are will require presentation of evidence to the panel. 3 We make this determination without 4 prejudice to a later determination that either there was 5 no contract or that the contract did not contain an 6 arbitration clause. Given that finding, it will be 7 necessary for us to proceed to hear evidence.</p> <p>8 JUDGE BENTON: And with that, 9 Mr. Diaz-Arrastia, we are prepared to proceed. As I 10 alluded to earlier this morning, our schedule -- I guess 11 it's almost 10:00 o'clock now. Rather than break at 12 about 11:30, which would be an hour and a half, maybe 13 we'll go to noon and then break for lunch then unless we 14 need a break sooner.</p> <p>15 And if we -- so do you wish to make 16 further opening or are you prepared to make -- call your 17 first witness? And if your answer is you're prepared to 18 call your first witness, I want you to pause because I 19 want to address Mr. Lee.</p> <p>20 MR. DIAZ-ARRASTIA: I think you have 21 mostly heard my opening. I have something sort of 22 previewing what our measure of damages is going to be, 23 but I don't know if that's really that necessary to 24 present. So it probably would make more sense just to 25 go ahead with my first witness.</p>
<p style="text-align: center;">47</p> <p>1 essentially like the one we're here before you-all.</p> <p>2 JUDGE WOOD: My question got answered as 3 to why I had read that document and nobody had talked 4 about it. I appreciate that. I think that's it.</p> <p>5 MR. LEE: I wanted to address real quick. 6 As counsel said, that document was never sent, but I 7 think, Your Honor -- I'm not familiar with the specific 8 case on the probate, but I do understand there is a lot 9 of cases --</p> <p>10 JUDGE WOOD: And I haven't read it either.</p> <p>11 MR. LEE: -- that talk about if your issue 12 is to the capacity or to duress, that's one issue as 13 opposed to basic contract formation. So there is a 14 distinction that the cases recognize.</p> <p>15 JUDGE BENTON: I have 9:35 so let's -- 16 let's just say at 9:50 we'll resume and see where we go 17 from there. All right?</p> <p>18 (Recess from 9:34 a.m. to 9:51 a.m.)</p> <p>19 JUDGE BENTON: Okay. We are back on the 20 record.</p> <p>21 The panel has arrived at a unanimous 22 determination and that determination will be announced 23 by Judge Davidson.</p> <p>24 JUDGE DAVIDSON: The panel will decline to 25 grant the motion to dismiss. We find that the issues of</p>	<p style="text-align: center;">49</p> <p>1 JUDGE BENTON: Okay. Do you want to make 2 further opening, Mr. Lee, or do you want to reserve 3 until they rest?</p> <p>4 MR. LEE: I think it would be helpful if I 5 made just a couple of brief comments because I addressed 6 just the motion to dismiss, but if you would indulge me. 7 I'll keep it very short, but I do think there's a couple 8 of things I want to say.</p> <p>9 Just so I can keep the record clear, I 10 appreciate the running objection. I just want to note 11 that we obviously respectfully disagree, but we're going 12 to continue to participate subject to the objection to 13 the panel's jurisdiction. And as I understand it, I do 14 not need to continue from here to raise that and waste 15 time doing that all day and every day?</p> <p>16 JUDGE BENTON: That's correct.</p> <p>17 MR. LEE: Okay. Thank you.</p> <p>18 OPENING REMARKS ON BEHALF OF THE RESPONDENT</p> <p>19 MR. LEE: If I can just make a couple of 20 quick comments. The contract requires a number of 21 elements, but two very key ones are you must have mutual 22 assent, in other words, you must agree on what it is 23 that is the subject of the contract and you must have 24 mutual intent to be bound.</p> <p>25 We think both of those are lacking in this</p>

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<p style="text-align: right;">50</p> <p>1 case. There was never an agreement on the terms of a 2 contract. This deal was all done through a broker, 3 Mr. Leyman. You are going to hear testimony from 4 Mr. Wilson at Vinmar who said that his firm terms of the 5 deal included U.S. origin MX.</p> <p>6 Apparently Tricon's witness will say that 7 their term was open origin MX. Those two terms do not 8 match up. Nevertheless, Mr. Leyman, acting as a broker 9 and without authority to match the parties, went ahead 10 and matched the parties, told each side, "You have an 11 agreement."</p> <p>12 Vinmar reasonably believed it did have an 13 agreement and an agreement on its terms. And so yes, 14 there is action within Vinmar on the days following the 15 discussion with Mr. Leyman where there's contract 16 discussions. There are things put in SAP. There are 17 actions taken in furtherance of what Vinmar believed to 18 be a deal.</p> <p>19 The evidence will show you that on 20 July 31st, several days after the discussions with 21 Mr. Leyman, a Tricon representative informed Vinmar that 22 it very well may supply Asian origin mixed xylenes. And 23 the immediate response from Vinmar was, No, no, no, no. 24 This is a U.S. origin deal. You must supply U.S. origin 25 MX.</p>	<p style="text-align: right;">52</p> <p>1 And certainly, the way that Tricon has approached this 2 case, they didn't -- they evidenced their intent not to 3 be bound by the broker confirmation and the sales 4 contract never resulted in an agreement on all of the 5 terms and it was never signed.</p> <p>6 We also -- we'll get in -- I'll wait on 7 the damages, but we certainly have a position on the 8 damages. We don't believe that Tricon has been damaged 9 in this case. It didn't have mixed xylenes in 10 inventory. It didn't do anything in furtherance of this 11 agreement when Vinmar told them, Wait a minute. We've 12 had a misunderstanding.</p> <p>13 And at the end of the day, that's really 14 what this is all about, it's a misunderstanding. The 15 broker messed up on the communications. There are no 16 notes from the broker. There are no tape recordings, 17 although he testified and told our trader that he, in 18 fact, recorded tape -- phone conversations. Those are 19 missing. We don't have anything from the broker except 20 for a handwritten confirmation that he said he prepared 21 and that's wrong.</p> <p>22 It makes a million dollar mistake on the 23 price. And so it's our contention that the broker 24 mangled the terms. He told us, "You have a deal on your 25 terms." He told Tricon they had a term on their -- or a</p>
<p style="text-align: right;">51</p> <p>1 And so if there -- there never was mutual 2 assent between the parties. Tricon refused to give 3 U.S. origin. Vinmar demanded U.S. origin. Mr. Leyman 4 and all the witnesses agree that if the broker does not 5 have identical deal terms then there is no agreement and 6 so we believe that the evidence that we will present to 7 you will show that there was a lack of mutual assent on 8 the key term of the agreement, what is the product?</p> <p>9 The other issue is mutual intent to be 10 bound. Both parties must intend to be bound by an 11 agreement and the fact that we're here today I think 12 demonstrates very clearly that Tricon never intended to 13 be bound by the broker confirmation, the document sent 14 by Mr. Leyman which does not have an arbitration 15 provision. They didn't intend to be bound by it.</p> <p>16 They're here in arbitration. What they're 17 saying is, "No, no, no. Our sales contract is the 18 document that governs this relationship now. The sales 19 contract makes it clear that it must be signed and it's 20 signed by both parties." Mr. Lockwood never signed the 21 agreement for Tricon. Mr. Wilson never signed the 22 agreement for Vinmar and there never was agreement on 23 all of the terms of the sales contract.</p> <p>24 So you don't have mutual assent from the 25 very get-go, in which case you never have an agreement.</p>	<p style="text-align: right;">53</p> <p>1 deal on their terms. There was some interaction between 2 the parties, both sides believing that their agreement 3 was the agreement.</p> <p>4 And as soon as it became an issue, as soon 5 as Tricon -- Vinmar was aware that Vinmar had a 6 different understanding, had been told something else by 7 the broker, within six or seven business days, depending 8 upon how you count it, Tricon -- or Vinmar said, "We 9 don't have a deal. We never came to shore on the 10 principal product."</p> <p>11 And so with that, I will rest at this 12 point.</p> <p>13 JUDGE BENTON: Okay. Mr. Diaz-Arrastia, 14 you want to call your first witness?</p> <p>15 MR. DIAZ-ARRASTIA: Yes, Your Honor. 16 I will call Mr. Brad Lockwood.</p> <p>17 JUDGE BENTON: Mr. Lockwood. If you will 18 raise your right hand.</p> <p>19 (At this time the witness was duly sworn 20 by Judge Benton.)</p> <p>21 JUDGE BENTON: All right. Very good. 22 Mister --</p> <p>23 MR. DIAZ-ARRASTIA: It's 24 Mr. Diaz-Arrastia.</p> <p>25 JUDGE BENTON: Diaz-Arrastia. Did I make</p>

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<p>54</p> <p>1 that mistake earlier?</p> <p>2 MR. DIAZ-ARRASTIA: Yes, but that's all</p> <p>3 right. You know, when you have a name like mine, you</p> <p>4 respond to most noises.</p> <p>5 JUDGE BENTON: All right,</p> <p>6 Mr. Diaz-Arrastia.</p> <p>7 MR. DIAZ-ARRASTIA: I knew you meant me.</p> <p>8 JUDGE BENTON: I was looking at you when I</p> <p>9 said it.</p> <p>10 MR. DIAZ-ARRASTIA: Yes. I knew you meant</p> <p>11 me.</p> <p>12 JUDGE BENTON: Very good.</p> <p>13 BRAD JASON LOCKWOOD,</p> <p>14 having been first duly sworn, testified as follows:</p> <p>15 DIRECT EXAMINATION (10:00 a.m.)</p> <p>16 BY MR. DIAZ-ARRASTIA:</p> <p>17 Q. Good morning, Mr. Lockwood.</p> <p>18 A. Good morning.</p> <p>19 Q. Could you state your full name for the record,</p> <p>20 please?</p> <p>21 A. Sure. Brad Jason Lockwood.</p> <p>22 Q. Okay. And please tell the panel a little bit</p> <p>23 about your education and background.</p> <p>24 A. Okay. I got a marketing degree from Texas A&M</p> <p>25 in College Station. I graduated in May of 1997.</p>	<p>56</p> <p>1 have you been personally involved in with a U.S.</p> <p>2 counterparty where the trade has not been performed in</p> <p>3 the end?</p> <p>4 A. One.</p> <p>5 Q. Is it this trade?</p> <p>6 A. Yes, it is.</p> <p>7 Q. Tell me a little bit about mixed xylenes,</p> <p>8 sometimes referred to as MX. Correct, sir?</p> <p>9 A. Yes.</p> <p>10 Q. Is that a commodity product?</p> <p>11 A. Yes, it is.</p> <p>12 Q. What are the principal places in the world</p> <p>13 where mixed xylenes are produced?</p> <p>14 A. It's produced in the U.S. It's produced in</p> <p>15 Asia. It's produced in Europe, the Middle East. It's</p> <p>16 basically produced all over the world.</p> <p>17 Q. And is it correct, sir, that within a certain</p> <p>18 specification, since it's a commodity, MX produced in</p> <p>19 the U.S., is it the same as MX produced in Asia or</p> <p>20 Europe or wherever?</p> <p>21 A. Yes, it is.</p> <p>22 Q. When Tricon trades on MX and sells MX, does it</p> <p>23 take title to the product before it sells it?</p> <p>24 A. Yes, we do.</p> <p>25 Q. Okay. And I understand that there will be</p>
<p>55</p> <p>1 Q. And, sir, are you now employed by Tricon</p> <p>2 Energy?</p> <p>3 A. Yes, I am.</p> <p>4 Q. And what is your position at Tricon?</p> <p>5 A. I am both one of the owners of the company and</p> <p>6 a partner as well as the trader -- a trader.</p> <p>7 Q. And how long have you been a trader, sir?</p> <p>8 A. Full time since January of 2005. Part time as</p> <p>9 I was transitioning out of my operations specialist role</p> <p>10 at the end of 2004.</p> <p>11 Q. Okay. And is it normal at Tricon that people</p> <p>12 start out as operations specialists and then go on to</p> <p>13 become traders if they're successful?</p> <p>14 A. Yes.</p> <p>15 Q. And what materials or products do you trade,</p> <p>16 sir?</p> <p>17 A. I handle -- on the aromatics side, I trade</p> <p>18 both mixed xylene, paraxylene, orthoxylene and toluene.</p> <p>19 Q. And how many trades have you personally made</p> <p>20 in your career?</p> <p>21 A. 900.</p> <p>22 Q. Now, that's a very precise number. Did you</p> <p>23 look that up over the weekend?</p> <p>24 A. Yes, I did.</p> <p>25 Q. And tell me, Mr. Lockwood, how many trades</p>	<p>57</p> <p>1 testimony that you could enter into a contract to sell</p> <p>2 MX before you own it?</p> <p>3 A. Yes. That's when we're selling short.</p> <p>4 Q. But do you have to take title before you can</p> <p>5 actually deliver it?</p> <p>6 A. Yes, you do.</p> <p>7 Q. Okay. So Tricon is not just a middle man</p> <p>8 then?</p> <p>9 A. That's correct.</p> <p>10 Q. Is Tricon exposed to market risk?</p> <p>11 A. Every day.</p> <p>12 Q. If you're buying and the price falls, you can</p> <p>13 make money. If you're buying and the price rises, you</p> <p>14 lose money?</p> <p>15 A. You need to rephrase that, please.</p> <p>16 Q. I'm sorry. I said it backwards.</p> <p>17 A. You were incorrect in what you said.</p> <p>18 Q. Yeah. If you -- in this case we're the</p> <p>19 seller. If you sell MX and the price falls, you've made</p> <p>20 a good deal. You've made money?</p> <p>21 A. That's correct.</p> <p>22 Q. And selling in this deal -- if after you sell</p> <p>23 the price rises you've lost money because you have to go</p> <p>24 get it?</p> <p>25 A. That's correct.</p>

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<p style="text-align: right;">58</p> <p>1 Q. That's the market risk? 2 A. That's correct. 3 Q. Let's talk about the transaction that is the 4 subject of our dispute. Did you deal through a broker, 5 sir? 6 A. Yes, I did. 7 Q. And was that broker Ed Leyman? 8 A. Yes, he was. 9 Q. Did you know Mr. Leyman before the Vinmar 10 transaction? 11 A. Yes, I did. 12 Q. Had you made deals with Mr. Leyman before? 13 A. I have. 14 Q. Tell us, sir, how many brokers in the U.S. 15 deal in MX? 16 A. I'd say as of today there are three, Ed Leyman 17 at MOAB, Kevin Kilkeary at a company called Blue Ocean 18 and -- I'm forgetting the third name, but he works at a 19 company called Fusion. So those are the three that 20 trade MX or broker MX. 21 Q. And do you deal with all of them, sir? 22 A. Yes, I do. 23 Q. Tell me, what is Mr. Layman's reputation in 24 the industry as a broker? 25 A. He -- I think he's one of the most senior</p>	<p style="text-align: right;">60</p> <p>1 Q. When that happens, does the broker work for 2 both sides of the deal? 3 A. Yes, he does. 4 Q. When you were working on this deal, had you 5 requested that Mr. Leyman keep your name confidential? 6 A. I did. 7 Q. And why is that, sir? 8 A. The market was starting to become weak and I 9 did not want to have my name out there as being one of 10 the sellers. 11 Q. Are you the only trader who does this? 12 A. No. 13 Q. Is that a common request that's made to 14 brokers? 15 A. Yes, it is. 16 Q. Do you sometimes not request confidentiality? 17 A. Yes, I do. 18 Q. If you do not request confidentiality, do you 19 expect that your identity will not be disclosed? 20 A. Can you -- 21 Q. If you -- if you do not request 22 confidentiality, what do you think is going to happen? 23 A. I think if the other side asks who's on the 24 other side that they'll tell them by name. 25 Q. And do you think that happens even if the</p>
<p style="text-align: right;">59</p> <p>1 brokers, having the most experience, so I think 2 everybody counts on him as being one of the most 3 reliable and senior brokers in the industry. 4 Q. In your personal dealings with Mr. Leyman, 5 have you found that reputation to be deserved? 6 A. Definitely. 7 Q. Now, who was the trader on the Vinmar side of 8 the transaction in this deal? 9 A. Dr. Rick Wilson. 10 Q. And did you know Rick Wilson before this 11 transaction? 12 A. Yes, I did. 13 Q. How did you know him before this transaction? 14 A. Once he joined Vinmar, we took him to lunch to 15 discuss opportunities that we could do together on 16 business. 17 Q. And was this your first deal with Mr. Wilson? 18 A. Yes, it was. 19 Q. Before the deal was made, did you communicate 20 directly with Mr. Wilson or did you communicate only 21 through Mr. Leyman, the broker? 22 A. Only through Mr. Leyman. 23 Q. Is that commonly the way things are done in MX 24 trading? 25 A. Yes.</p>	<p style="text-align: right;">61</p> <p>1 other side requested confidentiality but you did not? 2 A. Sure. 3 Q. And has it ever happened to you that 4 Mr. Leyman has refused to disclose the identity of a 5 counterparty in the deal? 6 A. All the time. 7 Q. Now, even if he disclosed your identity 8 because you did not request -- 9 A. That's correct. 10 Q. -- confidentiality? 11 A. That's correct. 12 Q. Now, let me ask you, Mr. Lockwood, during the 13 negotiation of this deal when you were working with 14 Mr. Leyman and Mr. Leyman was working with Mr. Wilson, 15 was there any mention or discussion of the mixed xylene 16 having to be of U.S. origin? 17 A. No, there wasn't. 18 Q. What did you-all discuss during the 19 negotiation of the deal? 20 A. We discussed the price, the quality, the 21 quantity, the fact that Vinmar needed flexibility on the 22 discharge port, wanting both Korea or Taiwan. He wanted 23 that in his option. We discussed the Incoterms being 24 CFR and we discussed the payment terms. 25 Q. Okay. Was there specific discussion of the</p>

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<p style="text-align: right;">62</p> <p>1 delivery window?</p> <p>2 A. Yes, there was.</p> <p>3 Q. Okay. And that was Mr. Wilson was asking for</p> <p>4 first half of September?</p> <p>5 A. Yes. He needed a very narrow window, first</p> <p>6 half of September.</p> <p>7 Q. Was that term very important to Mr. Wilson?</p> <p>8 A. Yes, it was.</p> <p>9 MR. LEE: Objection. Calls for</p> <p>10 speculation.</p> <p>11 Q. (BY MR. DIAZ-ARRASTIA) Well, did Mr. Leyman</p> <p>12 tell you that was very important to Mr. Wilson?</p> <p>13 MR. LEE: Objection. Leading.</p> <p>14 A. Yes, he did.</p> <p>15 JUDGE BENTON: It's overruled.</p> <p>16 A. He did.</p> <p>17 Q. (BY MR. DIAZ-ARRASTIA) Mr. Lockwood, you have</p> <p>18 some notebooks in front of you and they are labeled</p> <p>19 Joint Exhibits, Tricon Exhibits and Vinmar Exhibits. If</p> <p>20 you will take a look at the joint exhibits and go to</p> <p>21 No. 2, Joint Exhibit No. 2. That's at the second page.</p> <p>22 MR. DIAZ-ARRASTIA: Tracy, could you put</p> <p>23 that in full page?</p> <p>24 Q. (BY MR. DIAZ-ARRASTIA) And, Mr. Lockwood, is</p> <p>25 that the confirm that you received from Ed Leyman after</p>	<p style="text-align: right;">64</p> <p>1 Q. Okay. And let me ask you, Mr. Lockwood, did</p> <p>2 you think it was unusual to receive an amended confirm</p> <p>3 when there was a modification in the terms?</p> <p>4 A. I expected it.</p> <p>5 Q. Now, if you could take a look at the note near</p> <p>6 the bottom.</p> <p>7 MR. DIAZ-ARRASTIA: Tracy, see if you can</p> <p>8 zoom in on that, please.</p> <p>9 Q. (BY MR. DIAZ-ARRASTIA) Okay. And it says,</p> <p>10 "If there is anything outlined contrary to your</p> <p>11 understanding of our agreement, please notify us</p> <p>12 immediately by facsimile." Did you see that when you</p> <p>13 received these two confirms?</p> <p>14 A. Yes, I did.</p> <p>15 Q. And, sir, do traders review confirms as soon</p> <p>16 as they get them?</p> <p>17 A. They're required to.</p> <p>18 Q. Okay. And why is that important?</p> <p>19 A. Because you must review what the broker is</p> <p>20 saying you agreed to.</p> <p>21 Q. Now, when you reviewed Joint Exhibits 2 and 3,</p> <p>22 did you find something that was contrary to your</p> <p>23 understanding?</p> <p>24 A. Definitely.</p> <p>25 Q. And what was that?</p>
<p style="text-align: right;">63</p> <p>1 the deal was made?</p> <p>2 A. This was the initial confirm, yes.</p> <p>3 Q. Did you learn that after this initial confirm</p> <p>4 was sent out Mr. Wilson requested through Mr. Leyman for</p> <p>5 a change in the payment terms?</p> <p>6 A. Yes, I did.</p> <p>7 Q. And what was that change that was requested?</p> <p>8 A. We had agreed to 30 days from loading as the</p> <p>9 payment terms and he requested to be changing to LC</p> <p>10 documentary -- or a documentary letter of credit at site</p> <p>11 for payment terms.</p> <p>12 Q. Okay. And did you agree to that modification?</p> <p>13 A. After a discussion internally, I did agree to</p> <p>14 it, yes.</p> <p>15 Q. Okay. And you heard about it from Mr. Leyman.</p> <p>16 Is that correct?</p> <p>17 A. That's correct.</p> <p>18 Q. And you told Mr. Leyman, "Yes, we're okay with</p> <p>19 that"?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Could we now turn the page? Go to</p> <p>22 Joint Exhibit No. 3. Okay. And is this the confirm</p> <p>23 that you received after that modification in the payment</p> <p>24 terms?</p> <p>25 A. That's correct.</p>	<p style="text-align: right;">65</p> <p>1 A. The price was shown \$1 million below what I</p> <p>2 agreed to.</p> <p>3 Q. And let's take a look at it. If you just look</p> <p>4 at -- well, if we can go to J 2 first. There you go.</p> <p>5 We went over it. Price -- that's right. I'm sorry.</p> <p>6 1,110 per metric ton.</p> <p>7 And what had -- what was the price that</p> <p>8 had been agreed to?</p> <p>9 A. 1310 a metric ton.</p> <p>10 Q. Okay. Did you communicate that to Mr. Leyman?</p> <p>11 A. I did even prior to him requesting the payment</p> <p>12 change. So when I received the second confirmation, I</p> <p>13 pointed out to Ed Leyman that that price is still shown</p> <p>14 as incorrect.</p> <p>15 Q. Okay. And can we go over and see joint --</p> <p>16 look at Joint Exhibit 4? And if we could look at the</p> <p>17 price term.</p> <p>18 MR. DIAZ-ARRASTIA: And if you could zoom</p> <p>19 in on that, Tracy.</p> <p>20 Q. (BY MR. DIAZ-ARRASTIA) And here Mr. Leyman</p> <p>21 corrected the price term?</p> <p>22 A. Yes.</p> <p>23 Q. And Mr. Wilson agreed with this. Correct?</p> <p>24 A. That's correct.</p> <p>25 Q. Mr. Lockwood, in any of these three</p>

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<p style="text-align: right;">66</p> <p>1 confirms -- and let me ask you something. Were all of 2 these confirms delivered by Mr. Leyman to the parties on 3 July 22nd?</p> <p>4 A. The 22nd or the morning of the 23rd, but I 5 believe it was the 22nd.</p> <p>6 Q. And do any of these three confirms mention 7 anything about the origin of the product?</p> <p>8 A. No, they do not.</p> <p>9 Q. And when we talk about origin of the product, 10 what does that mean?</p> <p>11 A. Where the product was produced.</p> <p>12 Q. Okay. Where it's manufactured?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. Now, Mr. Lockwood, does it ever happen 15 that sometimes a trader may specify a particular product 16 origin in his deal?</p> <p>17 A. I have done so myself.</p> <p>18 Q. Okay. And tell me about that or tell the 19 panel about that. Excuse me.</p> <p>20 A. Okay. When I've had product that I've sold 21 into Mexico, I've had to buy U.S. origin specifically so 22 that I could comply with NAFTA Treaty because the U.S. 23 is given preferential treatment delivering product into 24 Mexico to avoid duties going into Mexico.</p> <p>25 So if you have product that was produced</p>	<p>1 here. Would somebody please tell me and get on the 2 record what MX is actually used for --</p> <p>3 THE WITNESS: Sure.</p> <p>4 JUDGE DAVIDSON: -- what its everyday 5 usage is?</p> <p>6 MR. DIAZ-ARRASTIA: Excuse me. That's a 7 good thing to talk about.</p> <p>8 JUDGE BENTON: Everybody knows that, Mark.</p> <p>9 JUDGE DAVIDSON: Okay. Well --</p> <p>10 Q. (BY MR. DIAZ-ARRASTIA) Mr. Lockwood, could 11 you explain to the panel --</p> <p>12 A. Sure.</p> <p>13 Q. -- what MX is used for?</p> <p>14 A. Mixed xylene has two primary uses. The first 15 is going into making paraxylene which then goes into 16 making -- I'll just say paraxylene is used in the making 17 of polyester.</p> <p>18 It goes into making polyester, which is 19 obviously a substitute for cotton. So the number one 20 use is predominantly in Asia to produce polyester.</p> <p>21 JUDGE DAVIDSON: Okay.</p> <p>22 A. The number two use is to go into gasoline 23 blending. Mixed xylene has an octane rating of 104 so 24 sometimes when people are trying to blend up gasolines 25 so that you have an octane of 87, 89 or 93 at your pump,</p>
<p style="text-align: right;">67</p> <p>1 in the U.S. when you deliver it to Mexico, you avoid a 2 certain duty on the import into Mexico because of the 3 NAFTA treaty between the two countries.</p> <p>4 Q. Okay. Now, if you need a product with a 5 particular origin, is that something that has to be 6 dealt with up front in your negotiations?</p> <p>7 A. Definitely.</p> <p>8 Q. And why is that, sir?</p> <p>9 A. It's impossible to negotiate with people after 10 the facts. If you -- if you need something up front, 11 you have to ask for it so the producer knows that they 12 have to guarantee something that was produced in the 13 U.S. versus giving you some other supply.</p> <p>14 Q. If you have to guarantee the origin of the 15 product, can that affect your ability to meet a delivery 16 date?</p> <p>17 A. Can you repeat that?</p> <p>18 Q. If you have to guarantee the origin of a 19 product, can that -- can that affect your ability to 20 meet a specific delivery date that you guarantee?</p> <p>21 A. Definitely, because it limits your ability to 22 substitute the cargo with other origins.</p> <p>23 Q. Okay.</p> <p>24 JUDGE DAVIDSON: This is going to sound 25 simple. Maybe I should have looked it up before we came</p>	<p>67</p> <p>1 they can add mixed xylene to the gasoline which blends 2 up the octane to meet the rating at the pump.</p> <p>3 JUDGE DAVIDSON: Thank you.</p> <p>4 Q. (BY MR. DIAZ-ARRASTIA) Now, Mr. Lockwood, if 5 you would take a look at the notebook that is marked as 6 the Tricon Exhibits.</p> <p>7 A. Yes.</p> <p>8 Q. First look at Tricon Exhibit No. 1.</p> <p>9 MR. LEE: And if I may, I object to the 10 relevance of this document. It has nothing to do with 11 this transaction and Vinmar certainly was not a party to 12 whatever this document purports to be.</p> <p>13 JUDGE BENTON: Is this used for 14 demonstrative --</p> <p>15 MR. DIAZ-ARRASTIA: It is for 16 demonstrative purposes, Your Honor. The purpose is to 17 show what a confirm looks like when the parties required 18 origin in the negotiations.</p> <p>19 JUDGE BENTON: I'm going to -- we're going 20 to allow it. It's received.</p> <p>21 Q. (BY MR. DIAZ-ARRASTIA) Now, Mr. Lockwood, if 22 you would look at Tricon Exhibit 1. And this is a MOAB 23 confirm in another deal that Tricon has done with 24 mister -- with MOAB. Correct?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">70</p> <p>1 Q. And if you would look in the quality portion 2 of this document, does it specifically say product to be 3 of U.S. origin?</p> <p>4 A. Yes, it does.</p> <p>5 Q. And that is what you would expect to see in 6 the confirm if origin was discussed during the initial 7 negotiation leading to the confirm?</p> <p>8 A. Yes, I would.</p> <p>9 Q. If origin is important to you as a buyer, 10 would you put that in the firm bid that you submit to 11 the broker?</p> <p>12 A. You would have to.</p> <p>13 Q. Now, let's take a look at Exhibit T 2, Tricon 14 Exhibit No. 2. And this is another similar MOAB 15 confirm?</p> <p>16 MR. LEE: I have the same objection.</p> <p>17 JUDGE BENTON: Same objection?</p> <p>18 Yeah. We're going to -- we'll allow it.</p> <p>19 Q. (BY MR. DIAZ-ARRASTIA) And this is another 20 MOAB confirm in another deal that Tricon did with MOAB. 21 Correct, sir?</p> <p>22 A. Yes, it is.</p> <p>23 Q. And on the quality term, what does that say 24 about origin?</p> <p>25 A. 99.70 minimum paraxylene purity. Product must</p>	<p style="text-align: right;">72</p> <p>1 earlier in the examination and I thought Mr. Runions had 2 piped up.</p> <p>3 MR. LEE: No, no. That was me. I think I 4 objected to speculation but --</p> <p>5 JUDGE BENTON: All right. Thanks. Let's 6 proceed.</p> <p>7 Q. (BY MR. DIAZ-ARRASTIA) And let's look in 8 the -- at the bottom part of the first page of Joint 9 Exhibit 5. Tell us what this is, Mr. Lockwood.</p> <p>10 A. I attached our sales letter to Rick Wilson 11 with a copy to my colleagues and just telling him, 12 "Thank you for the business and here's a copy of our 13 letter for proposing additional terms."</p> <p>14 Q. Okay. And if you could turn to the second 15 page of Joint Exhibit 5, that is what you referred to as 16 your sales letter?</p> <p>17 A. That's correct.</p> <p>18 Q. And does this sales letter -- beginning on 19 the -- first let's talk about the first page. Are the 20 terms spelled out in the first page of this Tricon 21 letter the same terms that were contained in the MOAB 22 confirm?</p> <p>23 A. They are, yes.</p> <p>24 Q. And let's now look at the second page. And 25 beginning with the second page, Mr. Lockwood, are these</p>
<p style="text-align: right;">71</p> <p>1 be non-Iranian or Chinese origin.</p> <p>2 Q. And let's just take another look -- quick look 3 at T 3, Tricon Exhibit 3.</p> <p>4 And, again, sir, this is another example 5 of what happens when origin is discussed in negotiation 6 and this one says, "No Iranian or Chinese origin." 7 Correct, sir?</p> <p>8 A. Yes, that's correct.</p> <p>9 Q. If you would now go back to the Joint Exhibit 10 notebook, Mr. Lockwood, and open up Joint Exhibit No. 5.</p> <p>11 JUDGE BENTON: And just a second. I 12 thought I understood Mr. Runions to have objected 13 earlier to something. Am I -- did I make a mistake?</p> <p>14 Have you -- during a question I thought Mr. Runions had 15 objected earlier on this witness.</p> <p>16 Have you had this witness this whole time?</p> <p>17 Are you going to have -- are you going to do the cross 18 on this witness?</p> <p>19 MR. LEE: Yes.</p> <p>20 JUDGE BENTON: Okay. I thought it was 21 Mr. Runions' witness.</p> <p>22 MR. LEE: No. I'm sorry. No, no, no, 23 Your Honor. I believe it was me and I just was 24 objecting to the --</p> <p>25 JUDGE BENTON: Now, there was a question</p>	<p style="text-align: right;">73</p> <p>1 Tricon's terms and conditions of sale?</p> <p>2 A. They are, yes.</p> <p>3 Q. In your industry, is it common that after a 4 deal is made you send a letter with your terms and 5 conditions of sale to your counterparty?</p> <p>6 A. Yes. Both sides typically pass paper as they 7 call it.</p> <p>8 Q. It's sometimes called passing paper?</p> <p>9 A. Yes.</p> <p>10 Q. When you sent Exhibit 5, was it your intention 11 to say, "The deal that we had before with Ed Leyman, 12 that's canceled. This is the new deal"?</p> <p>13 A. Not at all.</p> <p>14 MR. LEE: Objection. Leading.</p> <p>15 JUDGE BENTON: It's overruled.</p> <p>16 Q. (BY MR. DIAZ-ARRASTIA) What were you doing 17 with Exhibit 5?</p> <p>18 A. Just proposing additional terms, which is 19 standard for people to do.</p> <p>20 Q. Does it sometimes happen in the industry that 21 you propose additional terms but some of those 22 additional terms are not agreed to?</p> <p>23 A. Yes. It happens quite often actually.</p> <p>24 Q. Does it sometimes happen in the industry that 25 you propose additional terms and none of the additional</p>

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<p style="text-align: right;">74</p> <p>1 terms are agreed to?</p> <p>2 A. I would say that would be pretty rare because</p> <p>3 some -- most of the time these are pretty boilerplate</p> <p>4 additional terms that both sides usually do, but I guess</p> <p>5 in theory it's possible.</p> <p>6 Q. And does that mean that you don't have a deal?</p> <p>7 A. Not at all.</p> <p>8 Q. Let's take a look at the last page of this</p> <p>9 letter. Well, first of all, let's look at Paragraph 9</p> <p>10 on this J 5. Is that the arbitration provision, sir?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Now, let's look at the last page. And there</p> <p>13 are a couple of signature lines. Correct, sir?</p> <p>14 A. Yes, there are.</p> <p>15 Q. Did you expect that Exhibit 5 would be signed</p> <p>16 by you and Mr. Wilson?</p> <p>17 A. No. I never sign my contracts.</p> <p>18 Q. Okay. Are these documents ever signed?</p> <p>19 A. Unless they're a long-term contract with the</p> <p>20 company over a period of a year usually, then they're</p> <p>21 usually never signed.</p> <p>22 Q. Okay. They're treated differently whether</p> <p>23 you're dealing with a long-term contract or a spot</p> <p>24 contract. Is that what you mean?</p> <p>25 A. In theory, once you agree to all the material</p>	<p style="text-align: right;">76</p> <p>1 Q. Give me some examples of the contract terms</p> <p>2 that an operation specialist would negotiate.</p> <p>3 A. Inspection fees, interest, demurrage, law and</p> <p>4 jurisdiction, title and risk, those kind of things.</p> <p>5 Q. Would the operations specialist negotiate the</p> <p>6 dispute resolution provisions?</p> <p>7 A. Sure.</p> <p>8 Q. And what about credit terms, what needs to be</p> <p>9 in the letter of credit, things like that?</p> <p>10 A. Yes, definitely.</p> <p>11 Q. Mr. Lockwood, what happened to the price of</p> <p>12 mixed xylenes after July 22nd, 2008?</p> <p>13 A. Through what time period?</p> <p>14 Q. Well, let's say for the rest of that year.</p> <p>15 A. It was a historical fall.</p> <p>16 Q. Okay. Can we -- can you take a look at</p> <p>17 Exhibit 32 in the Tricon exhibit book, Exhibit</p> <p>18 Tricon 32. And if you could go to the next page.</p> <p>19 Mr. Lockwood, is this information about</p> <p>20 the price of MX that you obtained from Platts?</p> <p>21 A. Yes, I did.</p> <p>22 Q. Tell us what Platts is.</p> <p>23 A. Platts is a recording agency that basically</p> <p>24 assesses the market price at the end of each day in</p> <p>25 whatever region they're covering. So at the end of each</p>
<p style="text-align: right;">75</p> <p>1 terms even on a long-term contract you don't have to</p> <p>2 sign it. It's just that people like the formality on a</p> <p>3 long-term contract of signing it, but on spot deals I</p> <p>4 rarely ever see those signed, ever.</p> <p>5 Q. Have you ever signed Tricon's terms and</p> <p>6 conditions of sales in a spot deal?</p> <p>7 A. When I've been asked to, I have.</p> <p>8 Q. Have you -- has that actually happened?</p> <p>9 A. Yes, it has.</p> <p>10 Q. What did you do in this transaction,</p> <p>11 Mr. Lockwood, after you sent Exhibit 5 to Mr. Wilson?</p> <p>12 A. It's standard practice for me, once I've</p> <p>13 agreed to all the material terms, to pass it to my</p> <p>14 operations specialist who then takes care of everything</p> <p>15 from Point A to Z afterwards.</p> <p>16 Q. Okay. And who is that operations specialist?</p> <p>17 A. At the time it was Mr. Vuk Rajevac.</p> <p>18 Q. And why do you turn the transaction over to</p> <p>19 the op specialist?</p> <p>20 A. It's a -- it's a matter of time and</p> <p>21 efficiency. It allows me to focus on making more deals</p> <p>22 while he takes care of what I've already done.</p> <p>23 Q. Does the operations specialist negotiate</p> <p>24 contract terms?</p> <p>25 A. Yes, he does.</p>	<p style="text-align: right;">77</p> <p>1 day, they'll look at either deals that were done and if</p> <p>2 there's no -- if there are no deals that are done, they</p> <p>3 assess the average of the bid and the offer for the day</p> <p>4 that day.</p> <p>5 Q. And, Mr. Lockwood, what does this chart tell</p> <p>6 you about what happened to the price of MX after</p> <p>7 July 22nd, 2008?</p> <p>8 A. A rapid decline in the price.</p> <p>9 Q. If you will take a look at the price that</p> <p>10 Platts reports on July 22.</p> <p>11 A. Yes.</p> <p>12 Q. And then take a look at the price on</p> <p>13 July 31st, 2008.</p> <p>14 A. Okay.</p> <p>15 Q. Can you tell me by how much the price had</p> <p>16 declined between July 22 and July 31st?</p> <p>17 A. Around a hundred dollars a metric ton.</p> <p>18 Q. That's about 7 percent?</p> <p>19 A. Yes, that's correct.</p> <p>20 Q. And then take a look at the price that Platts</p> <p>21 reports for September 15th, which was the last delivery</p> <p>22 date under the contract with Vinmar.</p> <p>23 A. Okay.</p> <p>24 Q. And can you tell me by how much that price had</p> <p>25 declined from July 22 to September 15th?</p>

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<p style="text-align: right;">78</p> <p>1 A. It looks like around \$360 a metric ton. 2 Q. That's about 28 percent? 3 A. I think roughly, yes. 4 Q. And now take a look at the -- at the very end. 5 I think the last day on this chart is the 16th of 6 December. 7 A. Yes. 8 Q. Tell us what had happened to the price of MX 9 by the 16th of December of 2008. 10 A. It had just collapsed. 11 Q. Okay. About a 62 percent decline? 12 A. Yeah. It was a huge collapse. 13 Q. From 1354 to 501? 14 A. That's correct. 15 Q. Does mixed -- does the price of mixed xylene 16 tend to track the price of crude oil? 17 A. Yes, it does. 18 Q. What happened to the price of crude oil after 19 July 22nd, 2008? 20 A. At some point in July, the crude oil hit a 21 record high of \$147 a barrel and it proceeded to drop 22 all the way down into the 30's, \$30 a barrel. 23 Q. Now, Mr. Lockwood, after you sold the MX to 24 Vinmar on July 22nd, 2008, did Mr. Wilson approach you 25 to sell it back to you?</p>	<p style="text-align: right;">80</p> <p>1 A. Brad, if you want to wipe the slate clean, we 2 could do that. Otherwise, I have contract obligations 3 I'll supply into. 4 Q. And what is Mr. Wilson referring to? 5 A. He's saying that he'll -- 6 MR. LEE: Calls for speculation. 7 JUDGE BENTON: Why don't you rephrase your 8 question? 9 Q. (BY MR. DIAZ-ARRASTIA) Okay. Mr. Lockwood 10 at the time that you were having these instant messages 11 with Mr. Wilson, what were you and he discussing? 12 A. This instant message is actually Rick Wilson 13 following up with me directly after we tried to conclude 14 another deal through Ed Leyman. 15 Q. Okay. And were you discussing the MX that he 16 had bought from you on July 22nd? 17 A. Yes, I was. 18 Q. Okay. And what was your understanding of what 19 Mr. Wilson said when he said "We could wipe the slate 20 clean"? 21 A. He was offering to sell the material back to 22 me at the same price that he purchased, which was at 23 1310 a metric ton. 24 Q. And did you accept that? 25 A. No way.</p>
<p style="text-align: right;">79</p> <p>1 A. Yes, he did. 2 Q. Can we take a look at Joint Exhibit No. 15, 3 please? And if we could go -- did I get that right? 4 It looks like we have the wrong exhibit. 5 Excuse me for a moment. Could we -- I'm sorry. It's 6 Joint Exhibit No. 12, Mr. Lockwood. 7 A. Okay. 8 Q. Mr. Lockwood, Joint Exhibit 12 is -- at the 9 top of Joint Exhibit 12 is an e-mail that you're sending 10 yourself. Correct? 11 A. That's correct. 12 Q. But if you look down, there's some -- are 13 those instant messages that we see? 14 A. They are, yes. 15 Q. Okay. And they are between you and 16 Mr. Wilson? 17 A. Yes. 18 Q. And what is the date of those instant 19 messages? 20 A. July 31st, 2008. 21 Q. Okay. And if you will go down at the instant 22 message that Mr. Wilson sends you at 9:41 and 27 seconds 23 into the morning. 24 A. Okay. 25 Q. And what does Mr. Wilson tell you?</p>	<p style="text-align: right;">81</p> <p>1 Q. And why not? 2 A. The market had already fallen 450,000 or \$90 a 3 metric ton at the time that he was talking to me. 4 Q. And, sir -- if you'll go down to Joint 5 Exhibit No. 14, sir. Did you later learn that 6 Mr. Rajevac had sent this e-mail to Mr. Wilson on 7 July 29th? 8 A. Yes, I did. 9 Q. I'm sorry. Mr. Rajevac had sent that e-mail 10 to Mr. Pascu on July 29th? 11 A. Yes. 12 Q. And if we could look at No. 3, is this where 13 Mr. Rajevac is telling Mr. Pascu that they may supply -- 14 that Tricon may supply an Asian origin cargo? 15 A. That's correct. 16 Q. Okay. And why does he say that an Asian 17 origin cargo may have to be supplied? 18 A. Well, he's saying that we guaranteed an 19 arrival of September 1 through 15, so in case the vessel 20 incurs any delays which would cause the estimated time 21 of arrival to be outside of the 15th of September, which 22 we guaranteed, then we would have to substitute it with 23 an Asian origin cargo which would have a two to 24 three-day delivery timing to be able to meet the 25 guarantee that we gave.</p>

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<p style="text-align: right;">82</p> <p>1 Q. Okay. Mr. Brad Lockwood, how much -- let's 2 look at the date of this e-mail. It's July 29th, 2008, 3 about 5:00 in the afternoon.</p> <p>4 A. Okay.</p> <p>5 Q. Let's go back to Joint Exhibit 12. That 6 interchange that you had with Mr. Wilson was on July the 7 31st, 2008, in the morning?</p> <p>8 A. That's correct.</p> <p>9 Q. How much time had passed between Exhibit 14 10 when Mr. Rajevac says, "We may need to substitute Asian 11 origin" and the conversations that you are having with 12 Mr. Wilson on July 31st?</p> <p>13 A. Around a day and a half.</p> <p>14 Q. In the course of these conversations, did 15 Mr. Wilson ever tell you, "Hey, we can't take Asian 16 origin MX"?</p> <p>17 A. Never mentioned it.</p> <p>18 Q. In fact, what he did say is, "Can I sell it 19 back -- can I sell it back to you?"</p> <p>20 A. That's correct.</p> <p>21 Q. What happened after July 31st or let -- or 22 what happened later on July 31st?</p> <p>23 A. After I would not agree to buy back the 24 product at the same price that I sold it to them for, in 25 the afternoon I was called by Ed Leyman to say that we</p>	<p style="text-align: right;">84</p> <p>1 MX being of your U.S. origin and MX having a United 2 States loading port?</p> <p>3 A. Definitely there's a difference.</p> <p>4 Q. What is the difference between origin and 5 loading port?</p> <p>6 A. Loading port is just exactly that. It's just 7 the port that it was actually loaded from for export. 8 Origin is actually where it was manufactured.</p> <p>9 Q. Is it possible for mixed xylene to be loaded 10 in the U.S. Gulfport but not be of U.S. origin?</p> <p>11 A. Yes. Somebody could import material from a 12 foreign country and store it in a bonded tank, therefore 13 maintaining its foreign origin status. And when it's 14 loaded from that port, it will still be known as the 15 foreign origin status.</p> <p>16 Q. Okay. Now, after Mr. Wilson informed 17 Mr. Rajevac and Mr. Leyman that he would not accept 18 U.S. origin, did you try to negotiate a resolution with 19 Vinmar?</p> <p>20 A. I tried, yes.</p> <p>21 Q. Take a look at Joint Exhibit No. 18, sir. I 22 got on the wrong exhibit again. Here it is. I'm sorry. 23 Excuse me.</p> <p>24 Now, Mr. Lockwood, did you -- is this a 25 proposal for a resolution that was -- that you received</p>
<p style="text-align: right;">83</p> <p>1 have a problem.</p> <p>2 Q. Okay. Can we look at Joint Exhibit No. 15? You later learned that Mr. Rajevac received this e-mail from Mr. Wilson. Is that --</p> <p>5 A. That's correct.</p> <p>6 Q. And what's the date on that?</p> <p>7 A. July the 31st in the afternoon.</p> <p>8 Q. Okay. At 1:43 p.m.?</p> <p>9 A. Yes.</p> <p>10 Q. About how many hours after the IM exchange that you had had that morning?</p> <p>12 A. I'd say around four to five hours.</p> <p>13 Q. Okay. And Mr. Wilson says, "Vuk, we cannot accept open origin. It must be from the USA."</p> <p>15 A. That's correct. That's what he says.</p> <p>16 Q. Is this the first time that Tricon heard anything about the MX having to have U.S. origin?</p> <p>18 A. Yes, it was.</p> <p>19 Q. Mr. Lockwood, you told me earlier that when we talk about the origin of a product, if mixed xylene is of U.S. origin that means it was manufactured in the U.S.?</p> <p>23 A. That's correct.</p> <p>24 Q. Do you remember that?</p> <p>25 Is there a difference between referring to</p>	<p style="text-align: right;">85</p> <p>1 from Mr. Wilson?</p> <p>2 A. Yes, it is.</p> <p>3 Q. And he dealt through Mr. Leyman. Correct?</p> <p>4 A. That's correct.</p> <p>5 Q. And he is essentially saying, "I will do the deal that was negotiated on July 22 provided that you guarantee U.S. origin and guarantee first half of September delivery." Correct?</p> <p>9 A. But there is one noticeable change. He's asking for another seven days for him to be able to declare the discharge port.</p> <p>12 JUDGE DAVIDSON: To declare the what?</p> <p>13 THE WITNESS: The discharge port, whether or not they would like the product discharged in either Korea or Taiwan. He's asking for another seven days because contractually we had agreed to August 8th and he's asking for another seven days to declare where he wants the product discharged.</p> <p>19 Q. (BY MR. DIAZ-ARRASTIA) Okay. Did you accept this proposal?</p> <p>21 A. No, I did not.</p> <p>22 Q. Why did you not accept this proposal?</p> <p>23 A. It was clearly not a good faith proposal based on the fact that he was asking for another seven days to declare the discharge port. And if he's asking for USA</p>

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<p style="text-align: right;">86</p> <p>1 product guaranteed in the first half with a 30 to 45-day 2 transit time, there was a very high likely possibility 3 that I would not be able to perform on this contract as 4 he -- as he proposed.</p> <p>5 Q. If you will now look at Tricon Exhibit No. 16, 6 Mr. Lockwood. Was this a proposal that you made to 7 Mr. Wilson trying to come to resolution of the matter?</p> <p>8 A. Yes, it was.</p> <p>9 Q. And what did you propose?</p> <p>10 A. I tried to give him two options, hopefully -- 11 hoping that one of them he would choose. The first is 12 that I was saying that I would be giving you a vessel 13 that had U.S. origin. The ETA to Korea was September 14 the 6th. The ETA to Taiwan was September 12-13th. 15 So the estimated time of arrival was 16 exactly within the window that he had requested of one 17 through 15. And although I would not guarantee a first 18 half September arrival, I was giving him something that 19 had been estimated time of arrival during the window he 20 wanted.</p> <p>21 JUDGE WOOD: What's this exhibit number 22 again?</p> <p>23 MR. DIAZ-ARRASTIA: It is Tricon 24 Exhibit --</p> <p>25 JUDGE DAVIDSON: 16.</p>	<p>1 between the price at which we sold to Vinmar and the 2 price obtained for the cargo in the open market."</p> <p>3 A. That's correct.</p> <p>4 Q. Okay. And that is what you had instructed 5 Mr. Rajevac to say?</p> <p>6 A. Yes, I did.</p> <p>7 Q. Okay. And if you will look in the first page 8 of exhibit -- Joint Exhibit No. 21. Later on 9 August 8th, did you also send an e-mail to 10 Mr. Antonovich?</p> <p>11 A. Yes, I did.</p> <p>12 Q. And if you will look at where it says, 13 "Therefore." "Therefore, Vinmar is in breach of 14 contract and we reserve our right as a result of this 15 breach."</p> <p>16 A. That's correct.</p> <p>17 Q. That's what you told Mr. Antonovich on July the 18 8th --</p> <p>19 A. Yes.</p> <p>20 Q. -- at 5:13 p.m.?</p> <p>21 A. Yes.</p> <p>22 Q. I'm sorry. On August the 8th at 5:13 p.m.?</p> <p>23 A. That's correct.</p> <p>24 Q. Okay. And did you also set -- tell 25 Mr. Antonovich that you reserve your right to resell the</p>
<p style="text-align: right;">87</p> <p>1 MR. DIAZ-ARRASTIA: -- No. 16.</p> <p>2 Q. (BY MR. DIAZ-ARRASTIA) Did Mr. Wilson accept 3 these proposals?</p> <p>4 A. No, he did not.</p> <p>5 Q. Did Vinmar declare a discharge port on August 6 the 8th?</p> <p>7 A. No. They failed to do so.</p> <p>8 Q. What did you do then?</p> <p>9 A. I tried to find other buyers in the market.</p> <p>10 Q. Take a look at Joint Exhibit No. 21, beginning 11 there and going on to the next page. And this is an 12 e-mail that Mr. Rajevac sent to Mr. Wilson on August the 13 8th at 3:42. Is that correct, sir?</p> <p>14 A. That's correct.</p> <p>15 Q. Did you instruct Mr. Rajevac to send this to 16 Mr. Wilson?</p> <p>17 A. Yes, I did.</p> <p>18 MR. DIAZ-ARRASTIA: And, Tracy, if you 19 could zoom in on the highlighted section.</p> <p>20 Q. (BY MR. DIAZ-ARRASTIA) And Mr. Rajevac says, 21 "Furthermore, if your discharge port declaration is not 22 given by 5:00 p.m. CST today, Vinmar will be in breach 23 of the contract and we reserve the right to resell the 24 cargo in the open market and will hold Vinmar liable for 25 all damages, including but not limited to the difference</p>	<p>1 cargo?</p> <p>2 A. Yes, I did.</p> <p>3 Q. Mr. Lockwood, after Vinmar said that they 4 would not perform the contract, did Tricon still hope 5 that it would perform?</p> <p>6 A. Of course.</p> <p>7 Q. When was it that Tricon decided that Vinmar 8 probably would not perform?</p> <p>9 A. I think it was most evident when we gave a 10 vessel nomination showing that you had U.S. origin for a 11 product that would be ETA arriving in the first half and 12 they rejected it as a new proposal when all we were 13 trying to do was to get a vessel nomination as per the 14 contract.</p> <p>15 Q. And y'all notified Vinmar that you considered 16 the contract null on August the 8th when the discharge 17 port was not declared per the contract?</p> <p>18 A. That's correct.</p> <p>19 Q. Did you then try to find a replacement sale?</p> <p>20 A. I tried.</p> <p>21 Q. And what happened?</p> <p>22 A. It was impossible to find buyers with the 23 market falling as fast as it was.</p> <p>24 Q. And does it sometimes happen that when the 25 price is falling rapidly it's very difficult to</p>

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<p>90</p> <p>1 impossible to find spot buyers?</p> <p>2 A. Sure.</p> <p>3 Q. Okay. Is that called the market freezes?</p> <p>4 A. Yes, because if -- from a buyer's point of</p> <p>5 view if I don't buy today and I wait until tomorrow most</p> <p>6 likely the price will continue to fall so why buy today</p> <p>7 what you can get cheaper tomorrow? So the buyers don't</p> <p>8 do anything.</p> <p>9 Q. Okay. Did you eventually select a replacement</p> <p>10 sale --</p> <p>11 A. Yes, I did.</p> <p>12 Q. -- for the Vinmar sale?</p> <p>13 And what was that sale?</p> <p>14 A. I exercised my option under my long-term</p> <p>15 contract with KP where I forced them to take a 5,000</p> <p>16 metric ton cargo because it was in my option.</p> <p>17 Q. Okay. You -- and to back up, you sold -- you</p> <p>18 selected a sale to KP Chemical --</p> <p>19 A. That's correct.</p> <p>20 Q. -- as the replacement sale?</p> <p>21 A. That's correct.</p> <p>22 Q. What is KP Chemical?</p> <p>23 A. KP Chemical is the largest mixed xylene buyer</p> <p>24 in the world. They're based in Korea with their main</p> <p>25 discharge in Ulsan.</p>	<p>92</p> <p>1 entered the contract again not realizing it had already</p> <p>2 been entered in the system in December of '07.</p> <p>3 Q. Was the KP contract in place during all of</p> <p>4 2008?</p> <p>5 A. Yes, it was.</p> <p>6 Q. And describe to me what the KP contract</p> <p>7 required.</p> <p>8 A. KP was basically given the option in their</p> <p>9 option to show up and load FOB from the U.S., meaning</p> <p>10 they have to load it, they have to pick it up themselves,</p> <p>11 but if the price did not make sense for them to load in</p> <p>12 the U.S. against a U.S. based price and add freight to</p> <p>13 then take it to their port in Asia, if it did not make</p> <p>14 financial sense, they would not exercise their right to</p> <p>15 load the product.</p> <p>16 However, I negotiated the option to have a</p> <p>17 couple CFR options in my option so that regardless of</p> <p>18 the fact that either KP did not want to load the cargo</p> <p>19 or if they wanted to load it FOB I could override them</p> <p>20 and force them to take the cargo on a CFR basis.</p> <p>21 Q. So under the KP contract, if you were -- if</p> <p>22 you were willing to sell on a CFR basis KP would be</p> <p>23 obligated to take MX every month of the year?</p> <p>24 A. No. I believe I was only given three or four</p> <p>25 options a year to be able to do a CFR.</p>
<p>91</p> <p>1 JUDGE WOOD: What exhibit number is that?</p> <p>2 MR. DIAZ-ARRASTIA: It is first -- Your</p> <p>3 Honor, we're going to show those now. It is Tricon</p> <p>4 Exhibit 4.</p> <p>5 JUDGE WOOD: The one that's up now?</p> <p>6 MR. DIAZ-ARRASTIA: That would be Joint</p> <p>7 Exhibit --</p> <p>8 MS. LARSON: 1.</p> <p>9 MR. DIAZ-ARRASTIA: -- 1.</p> <p>10 JUDGE WOOD: Thank you.</p> <p>11 MR. DIAZ-ARRASTIA: Is the one that is up</p> <p>12 now.</p> <p>13 Q. (BY MR. DIAZ-ARRASTIA) And, Mr. Lockwood,</p> <p>14 calling your attention to Joint Exhibit No. 1, is that a</p> <p>15 copy of the contract with KP Chemical Company?</p> <p>16 A. Yes, it is.</p> <p>17 Q. Now, take also a look, Mr. Lockwood, at Tricon</p> <p>18 Exhibit 4 --</p> <p>19 A. Okay.</p> <p>20 Q. -- which also appears to be a copy of the KP</p> <p>21 contract, but this one is dated July the 20th, 2008,</p> <p>22 whereas Joint 1 is dated December 11th, 2007.</p> <p>23 A. That's correct.</p> <p>24 Q. Do you know why we have two of these?</p> <p>25 A. I believe somebody internally mistakenly</p>	<p>93</p> <p>1 Q. Did you have -- in July and September -- in</p> <p>2 July and August of 2008, was there an option available</p> <p>3 to be exercised?</p> <p>4 A. Yes, there was.</p> <p>5 Q. And did you exercise that option?</p> <p>6 A. I did, yes.</p> <p>7 Q. Okay. And the Vinmar sale was also a CFR sale</p> <p>8 to Asia. Correct?</p> <p>9 A. That's correct.</p> <p>10 Q. Can you tell me when you selected the KP</p> <p>11 contract as the replacement contract?</p> <p>12 A. After Vinmar failed to declare the discharge</p> <p>13 port on August 8th, my option with KP, I exercised it</p> <p>14 either on August the 10th or the 11th. I'm not sure</p> <p>15 which.</p> <p>16 Q. If you will take a look at Joint Exhibit</p> <p>17 No. 22. And is that where you made your selection, sir?</p> <p>18 A. That's correct.</p> <p>19 Q. And that is dated August 11th, 2008, at</p> <p>20 3:02 a.m.?</p> <p>21 A. That's correct.</p> <p>22 Q. Why did you select the K -- the sale under the</p> <p>23 KP contract as the replacement sale?</p> <p>24 A. Based upon my contract with KP, it was the</p> <p>25 average price of September, which was the same time I</p>

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<p style="text-align: center;">94</p> <p>1 was supposed to be delivering to Vinmar, so I knew that 2 whatever the price was that I was selling to KP it would 3 be a market-based price at the time of delivery to 4 Vinmar.</p> <p>5 Q. Okay. And let's just go over a couple of 6 things. Under the KP contract, you were selling mixed 7 xylenes. Correct?</p> <p>8 A. That's correct.</p> <p>9 Q. And they were going to be delivered in Asia?</p> <p>10 A. That's correct.</p> <p>11 Q. In Korea?</p> <p>12 A. In Korea.</p> <p>13 Q. And the quantity that they were required to 14 take was 5,000 metric tons?</p> <p>15 A. That's correct.</p> <p>16 Q. The same as under the Vinmar contract?</p> <p>17 A. That's correct.</p> <p>18 Q. And, as you said, it was -- the price was the 19 average Platts price in September?</p> <p>20 A. It was the September FOB Korea Platts average 21 for the month of September.</p> <p>22 Q. Okay. And why did you think that made it a 23 particularly suitable sale?</p> <p>24 A. With my delivery window being September 1 25 through 15, I knew that the average price for the month</p>	<p style="text-align: center;">96</p> <p>1 A. Yes, we did.</p> <p>2 MR. LEE: I'm going to object to this 3 question and the next -- where I think he's going. One 4 of the -- one of the issues that the panel may recall, 5 we asked for position sheet information about -- that 6 would disclose Tricon's inventory.</p> <p>7 Mr. Lockwood, in his deposition, was 8 unable to answer anything about what Tricon actually had 9 in inventory and they refused to produce any 10 documentation for their position sheets.</p> <p>11 And so I think it's un -- improper and -- 12 for him to testify now that he had other MX in avail -- 13 in availability to sell someplace else. They have 14 refused to produce the documents. He testified in his 15 deposition he was unable to answer those questions so we 16 should stick with the record that we have.</p> <p>17 MR. DIAZ-ARRASTIA: Your Honor, this is 18 not MX that they had in inventory.</p> <p>19 JUDGE BENTON: This is not a what?</p> <p>20 MR. DIAZ-ARRASTIA: This is not MX that 21 they had in inventory. What I am referring to is 22 delivery of MX that was made to KP in October of 2008. 23 Documents about that were produced and Mr. Runions 24 questioned Mr. Matthews about those documents in his 25 deposition.</p>
<p style="text-align: center;">95</p> <p>1 would be included in that sales price to KP so that it 2 would be a fair price.</p> <p>3 Q. Okay. Was there a difference in the MX 4 specification between the KP contract and the Vinmar 5 contract?</p> <p>6 A. They were very similar.</p> <p>7 Q. Okay. There was a slight difference?</p> <p>8 A. There was, yes.</p> <p>9 Q. Were they nonetheless very similar?</p> <p>10 A. They were.</p> <p>11 Q. Did that difference in the spec affect the 12 price of the MX being sold to KP versus that being sold 13 to Vinmar?</p> <p>14 A. No.</p> <p>15 Q. Can you tell me whether the MX that you used 16 to supply the KP contract, did that ultimately meet the 17 Vinmar spec?</p> <p>18 A. Yes, it did.</p> <p>19 Q. Was -- did Tricon make any other sales to 20 Asia -- of mixed xylenes to Asia in the September to 21 October 2008 timeframe?</p> <p>22 A. Make any sales at what time?</p> <p>23 Q. That means -- well, let me do it this way.</p> <p>24 Did Tricon deliver any other MX in Asia in the September 25 to October timeframe?</p>	<p style="text-align: center;">97</p> <p>1 And I just wanted Mr. Lockwood to explain 2 although that was delivered in October at a price of I 3 think around 1320 per metric foot that was based on a 4 contract that was made in July. And that's the only 5 thing that I want to --</p> <p>6 MR. LEE: And I mis -- with that -- I 7 misunderstood the question. I thought he was going 8 someplace else. I have no problem with this line. I 9 apologize.</p> <p>10 Q. (BY MR. DIAZ-ARRASTIA) Okay. Mr. Lockwood, 11 what my question to you just is, were there other MX 12 deliveries that Tricon made to Asia in September to 13 October 2008?</p> <p>14 A. Yes, there were.</p> <p>15 Q. Okay. And this was that October delivery that 16 I just mentioned?</p> <p>17 A. We had two deliveries, one of which was 18 done -- it was buy-sell agreement done prior to the 19 Vinmar transaction and the other one was the one that 20 you mentioned, yes.</p> <p>21 Q. Okay. Which was based on a contract that had 22 been made in July at the price in July?</p> <p>23 A. That's correct.</p> <p>24 Q. Do you remember what date in July?</p> <p>25 A. I believe the buy-sell agreement was done on</p>